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Peck - cross

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 GEOFFREY OSBERG, On behalf of
4 himself and on behalf of all
others similarly situated,

5 Plaintiffs,

6 v.

07 Civ. 1358 KBF

7 FOOT LOCKER, INC.,

8 Defendant.

9 -----x

10 July 22, 2015
11 9:00 a.m.

12
13 Before:

14 HON. KATHERINE B. FORREST,

15 District Judge

16
17 APPEARANCES

18 GOTTESDIENER LAW FIRM, PLLC
19 Attorneys for plaintiffs
20 BY: ELI GOTTESDIENER, Esq.
ALBERT HUANG, Esq.
21 STEVEN DANA COHEN, Esq.
Of counsel

22 PROSKAUER ROSE LLP (NY)
23 Attorneys for defendant
24 BY: JOSEPH EMANUEL CLARK, Esq.

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1 (Trial resumes)

2 (In open court; case called)

3 THE COURT: Please be seated, everyone. Good morning.

4 Yesterday my clerk had indicated that at the time she
5 came out and told whoever was still here about the time, but I
6 think, Mr. Gottesdiener, you're the one who is closest, it is
7 not surprising, since you're leading the charge as plaintiff,
8 but you've got about five hours and what?

9 THE LAW CLERK: Five hours and 45 minutes.

10 THE COURT: Five hours and 45 minutes left in total.

11 I say that because that includes any cross-examination
12 you'll be doing of Mr. Sher as well as the additional
13 examination of your witnesses. Just bear that in mind. I
14 think for defendants, what do they have?

15 THE LAW CLERK: I think about eight hours or so, 16
16 hours left.

17 THE COURT: 16 hours left for the defense. It is as
18 you would expect at this point, it is sort of flipped.

19 MR. RUMELD: One clarification. The 25 hours is
20 inclusive of the closing?

21 THE COURT: It is. I don't know that we'll need
22 closing arguments. We can do it on papers or we can do it
23 orally, as you folks like. I am not expecting a lot of
24 additional briefing, but we'll see where you are. If you want
25 to reserve some time, you can have some time for pulling things

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1 together. If it turns out everybody runs out of time, but they
2 do think they would like to pull things together, we can do it
3 in some reasonable briefing.

4 MR. RUMELD: Right. I would just request perhaps we
5 split tomorrow, we just know what we are doing over the
6 weekend.

7 THE COURT: Let's do that. Let's see where we are
8 tomorrow. Mr. Gottesdiener, then, you have your sense of time.

9 Ms. Peck, you remain under oath from yesterday.

10 THE WITNESS: Okay.

11 THE COURT: You may proceed.

12 PATRICIA A. PECK, resumes

13 CROSS-EXAMINATION (Continued)

14 BY MR. GOTTESDIENER:

15 Q. Good morning.

16 A. Good morning.

17 Q. We broke when I was asking you questions about one of the
18 communications that went out January 1, 1996 estimated plan
19 statement. Do you recall that?

20 A. Yes.

21 Q. Before going back into the actual communications, I just
22 want to ask you in terms of setting up the context, making
23 clear the context in which all of this is occurring, would it
24 be fair to say that this period of time, 1995, was a period
25 during which you were under pressure?

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1 A. Yes.

2 Q. You were under pressure from top management to cut costs?

3 A. Yes.

4 Q. Top management had actually turned over, there was any
5 management in place?

6 A. That's correct.

7 Q. Mr. Farah and his team?

8 A. Right.

9 Q. If I understand, there was somewhat of a culture change at
10 Woolworth when he and his team came in. Is that fair?

11 A. That's fair.

12 Q. Previously a lot of senior managers actually came from his
13 stores?

14 A. That's correct.

15 Q. And Mr. Farah and his team were a different breed?

16 A. Yes.

17 Q. And people who didn't fit in with the new culture sometimes
18 found that they didn't have a job any more?

19 A. That's correct.

20 Q. Not to put too fine a point on it, you wanted to keep your
21 job?

22 A. Sure.

23 Q. And you wanted to fit in with the new culture?

24 A. Yes.

25 Q. It would be fair to say that the edict for costs being cut,

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1 you perceived it as never-ending?

2 A. I wouldn't say never-ending, but there were a lot of them,
3 yes.

4 Q. From the Farah team?

5 A. Yes.

6 Q. And that didn't help your stress level, I would imagine?

7 A. Right.

8 Q. I think you termed it nonstop. Does that sound right?

9 A. It seemed like it at the time, yes.

10 Q. As an HR person, is it fair to say that when you're being
11 given these from on high tasks of cutting costs -- first of
12 all, when it comes to pensions, the only way to cut costs is to
13 cut benefits, right?

14 A. Yes.

15 Q. You were in a somewhat near impossible position of cutting
16 benefits but without upsetting employee's?

17 A. Yes.

18 Q. When you do anything, you do have to consider how employees
19 are going to react?

20 A. Yes.

21 Q. That's one of the reasons why it was your personal practice
22 to put a positive spin on whatever communication you sent out?

23 A. Yes.

24 Q. Now, with respect to the highlights memo, yesterday after
25 we broke I went back and looked at my notes, and I just want to

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1 clarify the highlights memo, I believe, is PX-4.

2 You agreed that it was a false statement that you get
3 your account balance as your lump sum for anyone who was in
4 wear-away. Do you remember we reviewed that yesterday?

5 A. Yes.

6 Q. I just wanted to make sure the record was clear that it was
7 known by you and the rest of the members of the team at the
8 time that communication went out, that participants who were in
9 wear-away would not be getting their account balance, they
10 would be getting a payment larger than their account balance?

11 A. Yes.

12 Q. With respect to the 1-1-96 statement, that is -- the blank
13 version was depo Exhibit 43, PX-43. When we got close to
14 breaking, I think I asked you about the statement on the
15 right-hand side that said under account balance, the amount
16 above is the amount you get paid if you ask for your lump sum
17 on that day. Do you recall those questions?

18 A. Yes.

19 Q. You said, you agreed it was a false statement, but then
20 when I asked well, you knew at the time that people would be
21 getting more than their account balance, everybody who was not
22 in the group of enhancement people who got more than other
23 people and maybe conceivably got out of wear-away, everybody
24 else you agreed you knew at the time would be getting more than
25 their account balance?

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1 MR. RUMELD: Objection.

2 THE COURT: Hold on. Let me just take a look at it.

3 (Pause)

4 THE COURT: I will allow it in terms of -- let's put
5 it this way. The record will reflect what the witness's
6 testimony was yesterday.

7 If you hear anything in that question that doesn't
8 strike you as accurate, you should tell counsel. Otherwise,
9 you can go ahead and answer it.

10 THE WITNESS: Okay.

11 MR. GOTTESDIENER: Let me try it another way.

12 BY MR. GOTTESDIENER:

13 Q. You knew at the point of conversion the amendment 1-1-96,
14 as long as you were using a 9 percent discount rate and the
15 GATT rating was less than 9 percent, you knew that that person
16 was going to be entitled to a payment that was more than their
17 account balance?

18 A. Yes.

19 Q. You knew that at the time this statement went out to
20 people, correct?

21 A. Yes.

22 Q. You knew that that was not a correct statement of the facts
23 for anybody who was in wear-away, correct?

24 A. Right.

25 Q. Now, we also talked about the edits that were proposed by

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1 outside counsel to that statement before it went out. Do you
2 remember when we were talking yesterday afternoon, that is
3 where we were at?

4 A. Yes.

5 Q. You were involved in the process of the generation of that
6 statement to folks, correct?

7 A. I didn't write the statement, but I probably read the
8 statement before it was sent out.

9 Q. Are you saying that you were not aware that outside counsel
10 had raised questions about the statement?

11 A. I don't recall that outside counsel raised questions about
12 the statement, no.

13 MR. GOTTESDIENER: Could you put on the screen PX 44.

14 I think we saw that yesterday and turn to a couple of
15 pages in.

16 BY MR. GOTTESDIENER:

17 Q. You were aware at the time that this statement went out,
18 were you not, that counsel had suggest that instead of saying
19 the account balance is the amount that you would be paid in a
20 lump sum if you left the same day, that it would be stated
21 unless your accrued benefit as of December 31, '95 as set forth
22 in 5 above is greater on an actuarially equivalent basis?

23 MR. RUMELD: Objection.

24 THE COURT: Hold on. Let me just read this.

25 (Pause)

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1 THE COURT: Sustained.

2 BY MR. GOTTESDIENER:

3 Q. Well, you knew that counsel was involved, both inside and
4 outside counsel, in looking at this statement. Is that fair?

5 A. That's fair.

6 Q. How did you know that?

7 A. I don't know. I mean we were all working together, so I
8 don't know.

9 Q. Inside counsel was Ms. Clarke, who has been sitting in the
10 courtroom, correct?

11 A. Yes, and Rita Zimmerman.

12 Q. You were aware at least as a general matter that outside
13 counsel had made comments on the statement?

14 A. Yes.

15 Q. That was in the November time-frame as the statement was
16 being developed. Is that fair?

17 A. Yes.

18 Q. And then on December 4, if you would cull up PX-625 --

19 MR. GOTTESDIENER: May I approach, your Honor?

20 THE COURT: You may.

21 THE WITNESS: Thank you.

22 BY MR. GOTTESDIENER:

23 Q. You received this memo that was directed to you and Ms.
24 Clarke from Tom Kiley and Carol Kanowicz about the plan
25 statement, correct?

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1 THE COURT: Is this 625?

2 MR. GOTTESDIENER: Yes. Do you have a copy? I have
3 an extra, your Honor.

4 (Pause)

5 THE COURT: All right. Go ahead.

6 BY MR. GOTTESDIENER:

7 Q. You received that, ma'am?

8 A. Yes.

9 Q. Do you see how Kiley's asking for any final comments,
10 please let us have your final comments, and then you see that
11 he states, "No comments per Sheilagh Clarke"?

12 A. Yes.

13 Q. You don't have any reason to doubt that you were involved
14 in determining that there were no comments that you were going
15 to provide you and Sheilagh back to Tom and Carol to make any
16 changes to the statements?

17 MR. RUMELD: Objection.

18 THE COURT: Hold on.

19 MR. GOTTESDIENER: I'll ask it again.

20 THE COURT: Yes.

21 BY MR. GOTTESDIENER:

22 Q. You have no reason to believe that you were not consulted
23 by Sheilagh before Sheilagh communicated to Tom, "no comments"?

24 A. No, that's not how it worked. I mean if we had comments,
25 we would independently give our comments back to Tom, not that

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1 Sheilagh had to consult with me.

2 Q. Okay. I guess I was just suggesting that perhaps that
3 reflected Sheilagh's communication to Tom that she had checked
4 with you and the two of you did not have any comments. Is it
5 possible that that occurred?

6 THE COURT: Don't have her speculate. Don't
7 speculate. Why don't you ask it more affirmatively.

8 If you know what Ms. Clarke was writing here and what
9 she intended to indicate, then you can testify as to that. If
10 you don't, don't get.

11 THE WITNESS: Okay.

12 MR. GOTTESDIENER: Just so the record is clear, that
13 is Mr. Kiley writing, "no comments per Sheilagh Clarke."

14 THE COURT: I understand. It requires the assumptions
15 about two different people: One, about what Ms. Clarke was
16 conveying; and, two, what Mr. Kiley was conveying about what
17 Ms. Clarke was conveying. The witness would be able to
18 interpret both in order to adequately answer your question.

19 MR. GOTTESDIENER: Let me try it this way.

20 BY MR. GOTTESDIENER:

21 Q. Would it have been your practice to sometimes communicate
22 to the team through someone else who was a trusted member of
23 the Woolworth Corporation?

24 A. Not a practice, but it happens, yes.

25 Q. You don't have any reason to believe that you did not give

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1 a final review yourself to the statement and conclude it was
2 okay to send it out in the form that it was in?

3 Do you want me to ask it again?

4 A. Yes.

5 Q. Because you don't have an actual recollection, I'm
6 assuming, of this moment in time, correct?

7 A. Right.

8 Q. I am just asking, you don't have any reason to doubt that
9 you actually did review the statement before it finally was
10 printed and sent out and gave your approval?

11 A. I don't have any reason to doubt it, right.

12 Q. And one reason you don't have any reason to doubt it is
13 that it was necessary to get your approval before that
14 statement went out?

15 A. Yes.

16 Q. And that's because, as we discussed yesterday, you were the
17 person responsible for the communication of the change to
18 participants?

19 A. Yes.

20 Q. And the actual plan statement went out in March, and we
21 discussed that, March '96, approximately, once the actual
22 earnings came in?

23 A. Yes.

24 Q. And you know that that assertion that you agreed was false
25 about this is the amount you get paid if you left this day for

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1 anybody in wear-away, that was false, you know that stayed in
2 there? It was not altered?

3 A. Okay, yes.

4 Q. In fact, you know that that statement was made
5 year-after-year to participants?

6 They were shown the account balance and even if the
7 payment they would have received that day was unrelated to
8 their account balance and more than it, they were still told
9 that's the Lump sum they would receive?

10 MR. RUMELD: Objection.

11 THE COURT: Hold on. Don't answer yet. I'll just
12 read the question.

13 (Pause)

14 THE COURT: You have two questions there, so I'll
15 sustain the objection. Please break it up.

16 BY MR. GOTTESDIENER:

17 Q. You know the plan statement effectively remained the same
18 with respect to telling people the account balance is the
19 amount that they will receive if they asked for a payment that
20 day?

21 A. Yes.

22 Q. So in '97 and '98, '99 and so forth and so on, this
23 statement continued to be made to people the same as in the '96
24 statement. Is that correct?

25 A. I haven't reviewed those statements. I don't recall

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1 exactly.

2 Q. You don't have any reason to doubt that that assertion
3 changed, do you, that this is the amount you would get if you
4 leave today?

5 THE COURT: I don't think you mean that question to
6 come out that way. I think you mean the opposite.

7 BY MR. GOTTESDIENER:

8 Q. As far as you're aware, the statement was not changed from
9 the statement in '96?

10 A. As far as I'm aware, that's correct.

11 Q. You know that the same statement was made in '96 in the
12 total compensation statements?

13 A. Yes.

14 Q. Those booklets that had a number of different benefits?

15 A. Yes.

16 Q. Including the retirement benefit?

17 A. Yes.

18 Q. The next communication that I would like to speak to you
19 about is the summary plan description --

20 A. Okay.

21 Q. -- that went out in late December of 1996. Does that sound
22 right?

23 A. No. No, I don't think it went out until March.

24 Q. The summary plan description now?

25 A. I understand. I don't think it went out in December.

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1 Q. I am sorry?

2 A. December of '96, you said?

3 Q. Right. Not '95? That is why you were saying March?

4 A. No.

5 Q. Could we put it on the screen, that is PX-5, and I will
6 show you a document that might refresh your recollection it
7 didn't go out until December?

8 A. Do you have the back cover because that is where the date
9 is?

10 Q. On the back cover, yes, I do. On the back cover it says,
11 it has a date of September 30, 1996.

12 A. Okay.

13 Q. But the defendants agree that it did not go out on
14 September 30, 1996. If you could get on the screen PX-59, and
15 this is just to refresh your recollection, ma'am.

16 MR. GOTTESDIENER: May I approach, your Honor?

17 THE COURT: You may.

18 BY MR. GOTTESDIENER:

19 Q. This was a letter that Mr. Kiley wrote that we actually
20 discussed with him when he testified. If you look at the date
21 of his letter, December 24, 1996 on the front page, and then if
22 you see on Page 2, he states:

23 "In the second full paragraph a revised summary plan
24 description reflecting the plan as amended January 1, 1996 is
25 currently being printed. In its place I have enclosed the SPD

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1 covering the plan in effect as of December 31, 1995 and a
2 letter to participants which describes the January 1, 1996 plan
3 amendments."

4 Do you see that?

5 A. I see it.

6 Q. Does that help you refresh your recollection that the
7 summary plan description for the amended plan didn't go out
8 until towards the end of the year of 1996?

9 A. No.

10 Q. Okay. That's fine. I'll still ask the questions and I
11 think the questions will still make sense.

12 A. Okay.

13 Q. You would have been involved necessarily in approving the
14 summary plan description before it went out, right?

15 A. Yes.

16 Q. Now, we touched on yesterday the fact that initially there
17 was an anticipated wear-away reported by Mercer to you and the
18 team of one to two years, and then it became two to three
19 years. This is in the spring of '95.

20 Then you testified that you then heard in September of
21 '96 that it actually was then anticipated to be a four to five
22 year wear-away. Do you recall that testimony?

23 MR. RUMELD: Objection.

24 THE COURT: Hold on.

25 THE WITNESS: Yes, I do.

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1 THE COURT: Hold on.

2 THE WITNESS: I'm sorry.

3 (Pause)

4 THE COURT: I'll allow the question. The objection is
5 overruled. You may answer.

6 A. Yes, that's what I said yesterday.

7 BY MR. GOTTESDIENER:

8 Q. It is what you said yesterday is the truth?

9 A. Yes.

10 Q. That letter that we put on the screen, the PX-9 letter,
11 could we have that back up on the screen. If we go to the
12 third page, it is a two-page letter, and attached to it is a
13 memo from Roger Farah to John Gillespie and John Cannon?

14 A. Yes.

15 Q. You received a copy of that memo?

16 A. The Roger memo.

17 Q. You learned about it?

18 A. I learned about it, yes.

19 Q. Why don't we just have on the screen also PX-113. So you
20 see here you actually did receive it, didn't you? This is
21 John --

22 A. Gillespie.

23 Q. -- Gillespie, who at this point in time you were reporting
24 to?

25 A. That's right.

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1 Q. Instead of Barry?

2 A. Correct.

3 Q. So he said that -- he said Pat -- why don't you translate
4 for us.

5 A. "Please set up a meeting for us and whomever else is
6 appropriate to meet with Cannon. Thanks, John."

7 Q. And then he started to write something, "I don't think our
8 NF" -- and then he scratched that out, do you see that there?
9 Like he had some further thought to convey. Do you see that?

10 A. I see it.

11 Q. So and he is saying he is concerned about that 6 percent
12 interest crediting rate that is guaranteed in the account
13 balance?

14 A. Roger?

15 Q. Yes, and he says, "Could you please work up an analysis
16 that shows how this impacts our program. Also please run the
17 numbers at various interest rates which may help us with some
18 of the deficit in the pension plan." Do you see that?

19 A. I see it, yes.

20 Q. You remember receiving that?

21 A. Yes.

22 Q. Then the Mercer letter, this is dated September 10, if we
23 can go back to PX-9, the first two pages of PX-9, you see this
24 is the next day somebody from Mercer -- do you see Jim Cassidy
25 is the person who sent this letter?

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1 A. Yes.

2 Q. You worked with Jim?

3 A. Yes.

4 Q. During the review of the plan alternatives before you
5 recommended the cash balance with the wear-away, right?

6 You worked with him as well as Jim Grefig during that
7 process?

8 A. Yes, we did.

9 Q. So he is directing this letter to Nancy Herman, and she is
10 who?

11 A. The manager of corporate finance in the treasurer's
12 department.

13 Q. You see on the second page at the bottom, you're copied,
14 Pat Peck?

15 A. Yes.

16 Q. And then at the top of the first page there's handwriting
17 and it says, "To Pat Peck, the letter from Mercer with Roger's
18 memo attached, Nancy"?

19 A. Yes.

20 Q. So you, in fact, got Roger's memo in two ways, from Nancy
21 and from John?

22 A. Right.

23 Q. And you understood this was a priority for Roger?

24 A. Yes.

25 Q. Looking at the dates, you certainly would agree that this

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1 is before the summary plan description goes out, and printed on
2 the back of it it says September 30, 1996?

3 A. Yes.

4 Q. Could we get up PX-5 and go to the very last page,
5 hopefully it is reproduced, the back cover. Could you
6 highlight in the right-hand corner -- now it says September 30,
7 1996. Is that right?

8 A. Yes.

9 Q. But you don't have any information that it actually was
10 printed and distributed on that date, correct?

11 A. No.

12 Q. But you're fairly confident it was not printed and
13 distributed any earlier than that date? Is that fair?

14 A. Right.

15 Q. So if we look at the letter itself which you have a hard
16 copy in front of you from yesterday, going back to PX-9, and
17 you reviewed that letter in preparation for testifying here
18 today. Is that fair?

19 A. I am sorry. Could you say that again.

20 Q. Yes. First of all, you were deposed, and prior to your
21 deposition three years ago, you looked at documents with
22 counsel and you prepared yourself to be examined. Is that
23 fair?

24 A. That's fair, yes.

25 Q. And you went through some process similar to that before

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1 starting your testimony yesterday. Is that fair?

2 A. Yes.

3 Q. One of the documents that you looked at was this letter?

4 A. Yes.

5 Q. You know that the letter says that Mercer believes there is
6 going to be three to four more years of wear-away, correct?

7 A. Yes.

8 Q. And you see that the letter itself actually makes
9 references specific to wear-away, it uses that term?

10 MR. RUMELD: Objection.

11 THE COURT: Do you want to highlight where you think
12 that term --

13 MR. GOTTESDIENER: That is one of them.

14 THE COURT: I'll allow it. Overruled.

15 BY MR. GOTTESDIENER:

16 Q. Do you see that?

17 A. Yes.

18 Q. That is in the second paragraph. If you go down, scroll
19 down, the court's indulgence, you see the last paragraph, it
20 also says the wear-away period will be extended a little
21 further?

22 A. Yes.

23 Q. And that is in the context of changing the 6 percent
24 interest crediting rate that is at least being explored as a
25 possibility at that time?

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1 A. Yes.

2 Q. So is it fair to say, remember yesterday we talked about
3 you didn't think the term wear-away was used right away, but
4 then it was being used certainly by this time, would you agree
5 that you all were using the term wear-away?

6 A. Yes, it's here.

7 Q. Now, at the top of the second page, do you see how
8 Mr. Cassidy says, "As a more extreme measure, the plan may be
9 frozen as of any future date"?

10 A. Yes.

11 Q. This is equivalent to reducing the pay credits mentioned
12 above to zero?

13 A. Yes.

14 Q. And he's explaining, as the paragraph goes on, that there
15 would be really big savings if that were done. Is that
16 correct?

17 A. Yes.

18 Q. And those savings are on the order of the savings that you
19 saw when you looked at in '95 doing temporary freeze on the
20 current plan?

21 MR. RUMELD: Objection.

22 THE COURT: Hold on. Overruled. You may answer.

23 A. Would you repeat that question, please.

24 BY MR. GOTTESDIENER:

25 Q. Sure. The savings that Mr. Cassidy tells you and Woolworth

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1 you could achieve by freezing the plan, this is now the amended
2 plan in '96, they were comparable to the savings that were
3 calculated you could save if you froze the 1995 version of the
4 plan?

5 A. Okay, yes.

6 Q. You see he calls that an extreme measure, as a more extreme
7 measure rather, correct?

8 A. That's what he wrote.

9 Q. And the way you and the team and the company viewed an open
10 freeze aligned with the amended plan or pre-amended plan, that
11 was how you viewed it, as an extreme measure?

12 A. Yes. Well, those are Jim's words, but we had already said
13 we were going to freeze the plan.

14 Q. But in '96, because these requests for cuts were not
15 stopped, you all at least considered the possibility again of
16 doing a total open freeze of the entire plan?

17 A. Yes.

18 Q. And that was rejected because despite the very large
19 savings, you considered the employees would in effect not
20 accept it? The hit to morale would be too great to do that,
21 correct?

22 MR. RUMELD: Objection.

23 THE COURT: Hold on. So you've got two questions.

24 You need to break it down.

25 BY MR. GOTTESDIENER:

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1 Q. In '95 we looked at the plan alternatives, that page in the
2 May dec that was then repeated in the other decs, and you saw
3 that by far the most savings that could be achieved was by a
4 temporary freeze, correct?

5 A. Yes.

6 Q. But that was considered unacceptable despite the large
7 amount of savings because of the way employees were expected to
8 react to an open freeze of the existing plan, correct?

9 A. Yes. Not just the employees, though.

10 Q. Wall Street as well?

11 A. Right.

12 Q. Customers as well?

13 A. New, new associates, right.

14 Q. New associates as well?

15 So the perception was a very -- in fact, that was the
16 driver as to why that was rejected given how much it could have
17 saved, correct?

18 A. Correct.

19 Q. And again that was the driver in effect in response to
20 Roger in '96 when it came back on the table, should we freeze
21 the amended plan, correct?

22 A. Yes.

23 Q. And so that was not done despite his desire for more
24 savings, correct?

25 A. Correct.

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1 Q. And that's because you and top management, including Roger,
2 took into account the perception of actions that you took with
3 respect to the pension plan?

4 You took into account, I am restating it, you took
5 into account perceptions, the perceptions you expected before
6 doing anything with respect to cutting the pension plan?

7 A. Yes.

8 Q. Now, still in this fall 1996 time-frame when at this point
9 in time there's another Roger Farah request for cuts and there
10 is an estimate now that the wear-away is going to last four to
11 five years, you and Mr. Kiley had a meeting with Mr. Farah and
12 Mr. Hippert to discuss these matters, correct?

13 A. Yes.

14 Q. What can you tell us you recall about that meeting.

15 A. Well, I think that was one of the charts that we looked at
16 yesterday, and we just went over it with them and explained.

17 You remember you asked about all the Tom Kiley notes
18 on that page, and we just explained it to Roger and Dale.

19 Q. What we looked at yesterday that had all those notes that
20 you're referring to was from 1995. Now we're in 1996.

21 A. Okay.

22 Q. In 1996, after Jim Cassidy sent this letter, Roger sent
23 that note, you and Mr. Kiley sat down with Mr. Farah and
24 Mr. Hippert. Is that correct?

25 A. I don't recall that Barry wasn't there.

F7MJOSB1

Peck - cross

1 Q. You don't recall what?

2 A. That Barry wasn't there also.

3 THE COURT: You think Barry, Mr. Thomson was present?

4 THE WITNESS: It is possible, yes.

5 BY MR. GOTTESDIENER:

6 Q. Again we are talking about 1996 after the Mercer letter.

7 A. Okay.

8 Q. I am jumping around some times, but we do want your best
9 recollection.

10 A. Okay. I don't remember the meeting exactly.

11 Q. After the plan went into effect?

12 A. After the plan was in effect, right.

13 Q. Tell us anything you can recall about that meeting, if you
14 can.

15 A. Yeah. I don't have anything I recall about that meeting
16 specifically, no.

17 Q. Let me see if a document that we'll put on the screen and
18 I'll hand you helps refresh your recollection. This is PX-300,
19 a December 3rd document.

20 MR. GOTTESDIENER: May I approach, your Honor?

21 THE COURT: You may.

22 MR. GOTTESDIENER: Does your Honor need a copy?

23 THE COURT: I don't. PX-300? Hold on. I have
24 something different.

25 THE WITNESS: Thank you. No. I have got it. Thank

F7MJOSB1

Peck - cross

1 you.

2 BY MR. GOTTESDIENER:

3 Q. This is a memo from Tom Kiley to Pat Peck, signed by Tom,
4 copy to Carol and Marion, and it talks about the retirement
5 plan and the Kinney manufacturing plan statistics. Do you see
6 that December 3rd?

7 A. Yes.

8 Q. And he states, "In follow-up to our meeting of November 12,
9 1996 with Roger Farah and Dale Hippert, I wish to provide you
10 with information regarding the Woolworth retirement plan."

11 And then what he shows is the lump sums paid in 1995
12 and the lump sums paid in 1996 through November 1st of 1996.
13 He then states under the box, based on data from January 1
14 through September 30, 1996, payments processed -- under now the
15 amended plan -- were as follows. Then he breaks it down by
16 lump sums processed due to terminations, 1651. Lump sums
17 processed initiated by associates, 510. Annuities processed or
18 who elected to start and receive an annuity, a smaller number
19 of 143. Then the last category vested-window closed; entitled
20 to future benefits, 136.

21 Do you see that there?

22 A. Yes.

23 Q. Just on that last entry, vested-window closed, what is that
24 a reference to, window closed?

25 A. I don't know that I know what the window closed is, but we

F7MJOSB1

Peck - cross

1 had a lot of terminated vested associates in our plan, people
2 who were vested but they had terminated.

3 Q. Here would this be a reference -- you haven't seen this
4 document recently, I take it?

5 A. I have not.

6 Q. If you look again at the sentence that caps off what I just
7 read off, looking at the first three quarters of that year?

8 A. Right.

9 Q. Would it make sense to you that the 136 people are people
10 for whom the six-month window after they terminated had been
11 closed.

12 A. Closed, ah-huh.

13 Q. And you know --

14 A. Yes, that makes sense.

15 Q. Just so the record is clear, that window is if you
16 terminate and you're under 55, you only have six months to
17 elect and start to receive your benefit?

18 If you want a -- if you -- yes? If you want an
19 annuity, I'll start. After that, the window closes until you
20 become age 55?

21 A. Right.

22 Q. So does this help refresh your recollection about your and
23 Tom's meeting with Roger and Dale about the retirement plan on
24 November 12, 1996?

25 A. No.

F7MJOSB1

Peck - cross

1 Q. Given the context where we've seen the Mercer letter and
2 the facts that you knew about how many people were in
3 wear-away, you don't have any reason to doubt that this meeting
4 involved reporting to Roger and Dale about how lump sums were
5 saving money from the plan?

6 MR. RUMELD: Objection.

7 THE COURT: Hold on. Sustained. To the extent there
8 is simply an inference which we all can draw, let's not have
9 her speculate. I think that you should probably move on to the
10 document you're aiming at. That might actually be the best
11 refresher.

12 MR. GOTTESDIENER: That is all I have.

13 THE COURT: You're not going to PX-11?

14 MR. GOTTESDIENER: Ill go to PX-11.

15 THE COURT: You don't need to. I thought PX-11 were
16 slides from that meeting. Is that not right?

17 MR. GOTTESDIENER: I don't believe so. Can you get
18 PX-11 up. The next one. Your Honor's correct. What I was
19 going to go to was -- let me show her PX-11.

20 While I am getting a hard copy, Randall, if you could
21 flip through so the witness could start to see if there is
22 anything there that helps refresh her recollection.

23 (Pause)

24 MR. GOTTESDIENER: We do not have a hard copy to
25 provide you.

F7MJOSB1

Peck - cross

1 BY MR. GOTTESDIENER:

2 Q. This document, if you go to the first page of it, not the
3 cover, but do you see Woolworth retirement plan, November 11,
4 1996?

5 A. Yes.

6 Q. And then going to the first page after that, you see this
7 is discussing the section first is benefits department, review
8 of plan options for additional cost savings?

9 A. Yes.

10 (Continued on next page)

F7mnosb2

Peck - cross

1 Q. And then the second section is treasurer's department, plan
2 sensitivity analysis?

3 A. Yes.

4 THE COURT: Do you want to see a hard copy or are you
5 OK on the screen?

6 MR. GOTTESDIENER: I have one now.

7 THE COURT: All right. You do.

8 MR. GOTTESDIENER: May I approach, your Honor?

9 THE COURT: Yes.

10 BY MR. GOTTESDIENER:

11 Q. Is anything about this meeting coming back to you seeing
12 this document?

13 MR. RUMELD: You can flip through and go to the next
14 page, Randall.

15 A. The Roger and Dale meeting was -- what was --

16 Q. The date on that deck is November 11, and the Kiley memo to
17 you references a meeting of November 12?

18 A. Right. OK.

19 Q. So are you recalling that there was one meeting and then a
20 follow-up meeting?

21 A. Right. And this looks like, PX 11 looks like a document
22 that we would have done jointly with treasury.

23 Q. So that meeting would have been a larger meeting with
24 people from treasury and top management as well as Roger and
25 Dale?

F7mnosb2

Peck - cross

1 A. Yes.

2 Q. Are you remembering a meeting subsequent the following day
3 with just you, Roger and Dale and Tom specifically talking
4 about the savings generated by lump sum cash-outs?

5 A. I don't remember the meeting, no. It doesn't mean it
6 didn't happen, but I don't remember it.

7 Q. Thank you. So let's move to the summary plan description.
8 PX 5. Do you have a copy of that in front of you?

9 You have the same document in the binder.

10 A. OK.

11 Q. Get me give you our copy so you don't have to hassle with
12 the binder.

13 MR. GOTTESDIENER: May I approach, your Honor?

14 THE COURT: Yes.

15 A. OK. Thank you.

16 Q. You understood the importance of the SPD in terms of
17 communicating accurately to participants the terms of the
18 amended plan?

19 A. Yes.

20 Q. I think you agreed earlier that your approval of this
21 document was necessary for it to be put in final form and
22 distributed, is that correct?

23 A. Yes. But not just my approval.

24 Q. Other people had to approve it?

25 A. Sure.

F7mnosb2

Peck - cross

1 Q. But you were the one -- the buck stopped with you?

2 A. Yes.

3 Q. You gave the final approval?

4 MR. RUMELD: Objection.

5 THE COURT: Overruled.

6 A. Yes.

7 Q. We have the context of you knowing about an anticipated now
8 four- to five-year wear-away, right?

9 A. Yes.

10 Q. Also, the context in which you knew at the time, the prior
11 communications that went out, the announcement letter in
12 September, the highlights in November, the plan statement
13 estimated in December or January '96, the March '96 actual
14 statement, the total compensation statement, you knew at that
15 time that all of those communications contained statements that
16 were false for anybody who was in wear-away?

17 A. For anyone who was in wear-away, yes.

18 Q. You knew that at the time you gave your final approval to
19 the SPD, correct?

20 A. Yes.

21 Q. So did you take the opportunity of the SPD to finally clear
22 things up for participants?

23 MR. RUMELD: Object to the form.

24 THE COURT: Overruled.

25 A. Not explicitly, no. We did not.

F7mnosb2

Peck - cross

1 Q. So you knew explicitly that the wear-away was anticipated
2 to last another three to four years?

3 A. Yes.

4 Q. And you knew that the early retirement subsidy was
5 something that people would not obtain the value of if they
6 took a lump sum?

7 A. Yes.

8 Q. And you don't explain anything about the early retirement
9 subsidy in the SPD, do you?

10 A. No.

11 Q. You don't say anything about lump sums might seem
12 attractive, but you need to also consider you might get a lot
13 more value in the form of an early retirement subsidy?

14 A. We do not say that.

15 Q. In the SPD, correct?

16 A. In the SPD.

17 Q. Actually, you didn't say that anywhere to participants,
18 correct?

19 A. Correct.

20 Q. And you didn't say anywhere to participants, We've got this
21 new cash balance plan that you have now been in, we need to
22 make sure you understand that that whole structure with the
23 account and the growing account isn't going to mean anything to
24 you if it does not exceed the value of what you already earned
25 up to 12/31/95, correct?

F7mnosb2

Peck - cross

1 A. We do not say that.

2 Q. You never said that to participants not just in the SPD but
3 in any communication, written communication, correct?

4 A. I can't say never. I don't recall all the documents
5 without going through them again.

6 Q. But certainly you don't know of any sitting here now that
7 explicitly tells people what I stated in my last question?

8 A. No.

9 Q. That would stick out in your mind, wouldn't it?

10 A. Pardon me.

11 Q. That would stick out in your mind, wouldn't it?

12 A. Yes, I would think so, yes.

13 Q. Because that would be, in effect, not so good news?

14 A. Right.

15 Q. That, listen you are not going to earn new benefits for a
16 time, you agree that would be bad news?

17 A. Yes. That would be bad news.

18 Q. And you made an affirmative decision to only talk about the
19 amended plan in terms of good news?

20 A. In our communications, yes.

21 Q. You just seemed to caveat in your communications. Are you
22 thinking of something else? I'm asking about in your
23 communications to employees?

24 A. Uh-huh.

25 Q. Are you referring to your internal discussions with the

F7mnosb2

Peck - cross

1 team that you would discuss that, that there's no new benefits
2 being earned?

3 A. Well, the team was aware of it.

4 Q. And the team was aware and you were one of the team
5 members, that it was in fact through the wear-away that the
6 cost savings that Roger wanted were actually achieved, correct?

7 A. Yes.

8 Q. So, if we look at page 11 of the summary plan description,
9 at the bottom, do you see where it says, How your retirement
10 benefit is determined?

11 A. Yes.

12 Q. It says, Your plan benefit is based on the account balance
13 you accrue, or earn, while a participant.

14 A. Yes. That's what it says.

15 Q. So is that true, ma'am, for people in wear-away?

16 A. Not for people in wear-away, but for anybody else.

17 Q. In September, November, October, December of '96 you knew
18 that effectively everybody in the company was in wear-away?

19 A. There are exceptions.

20 Q. And you thought it was the exceptions that allowed you to
21 put out a statement that was otherwise false to the vast
22 majority of people?

23 A. This is how it would be after they were no longer in
24 wear-away, so it's not false. It's how the plan would work.

25 Q. True. For anyone who was in wear-away it was false, do you

F7mnosb2

Peck - cross

1 agree?

2 A. It didn't work that way for anyone in wear-away. That's
3 correct.

4 Q. When you say it didn't work that way, you know that the SPD
5 is a 20-something-page document, right?

6 A. Yes.

7 Q. Essentially the whole document is irrelevant to anybody who
8 was in wear-away?

9 A. I don't think so, but --

10 Q. Until you got out of wear-away?

11 A. Right.

12 Q. You knew, I think you mentioned you thought there was going
13 to be more terminations in the future, correct?

14 A. Yes.

15 Q. So you knew that there were going to be thousands of people
16 perhaps who would never get out of wear-away because they would
17 no longer be employed and be able to work their way out of
18 wear-away, correct?

19 A. Yes. That's correct.

20 Q. Because you understood that in effect to get out of
21 wear-away you have to kind of re-earn the benefit you already
22 earned --

23 A. Right.

24 Q. -- through service to the company?

25 A. Uh-huh.

F7mnosb2

Peck - cross

1 Q. In exchange for no additional new benefits, right?

2 A. Yes.

3 Q. So, back to the relevance of this 20-something page
4 document, putting aside for the moment the accuracy of it, the
5 entire document is focused on the account balance benefit,
6 correct?

7 A. Yes.

8 Q. You mentioned in your deposition, and I'm sure you will
9 discuss with Mr. Rumeld when he asks you questions, that there
10 is arguably some single sentence in this document that you will
11 claim is a reference to the other benefit.

12 A. Uh-huh.

13 Q. Is that your -- yes? I didn't hear your answer.

14 A. Yes.

15 Q. Is that fair, that in this document you contend that there
16 is a sentence or two that does tip somebody off to the fact
17 that there is another benefit under the amended plan?

18 Is that fair?

19 MR. RUMELD: Objection.

20 THE COURT: Sustained. Why don't you take the
21 question, because it's got many parts to it now, and make a
22 single question.

23 BY MR. GOTTESDIENER:

24 Q. You agree I just don't want you, ma'am, or the Court to
25 misunderstand it, I agree that sentence would be relevant.

F7mnosb2

Peck - cross

1 But assuming the accuracy of your contention, you
2 contend that there is a sentence or two in the 20-page document
3 that refers to the other benefit to which people are entitled
4 under the amended plan, is that correct?

5 A. Yes.

6 Q. So, on a rough basis, you do agree that, even according to
7 you, that the document is about 97 percent irrelevant to
8 anybody who is in wear-away?

9 A. I don't know about 97 percent.

10 Q. OK.

11 A. That is a guess.

12 Q. If there is a sentence or two and there is a 20-page
13 document, you do agree that the vast majority of this
14 discussion in the document is just irrelevant to anybody who is
15 in wear-away and never gets out of wear-away?

16 A. To anyone who doesn't get out of wear-away, that's correct.

17 Q. Now, the sentence that you contend is a tipoff that there
18 is another benefit, can you tell us where that is and explain
19 to us how it is that you contend that this would tip somebody
20 off to the fact that the cash balance benefit is irrelevant to
21 them until they get out of wear-away?

22 A. I would have to go through it again to find that
23 sentence --

24 Q. Please go through it.

25 A. -- specifically.

F7mnosb2

Peck - cross

1 There is a reference on page 5 under the compensation
2 paragraph that refers to other employee welfare plans.

3 Q. That is not a reference to the accrued benefit under the
4 plan prior to 1996 or to wear-away, is it?

5 A. OK.

6 Q. I'm asking.

7 A. Yes, you're right. So on page 6, we discuss the initial
8 account balance. Is that what you are referring to?

9 Q. I want to know what you contend is the tipoff that people
10 started in the new plan at a deficit they had to work their way
11 out of before the new benefits.

12 A. OK.

13 Q. If you think that's one of or the sentence, just let us
14 know.

15 A. I don't know where it is exactly. I would have to go
16 through the whole document right now. I don't remember exactly
17 where it is.

18 Q. Well, how about taking the vantage point of the average
19 participant who receives the summary plan description who's
20 already received the announcement letter, the highlights memo,
21 the two plan statements, and the total compensation statement.
22 Approach it that way and see if you can look at it from that
23 vantage point of the average participant. See if you can --

24 A. The average participant is not going to read all this
25 22-page SPD generally.

F7mnosb2

Peck - cross

1 Q. They will read the highlights?

2 A. They'll read the highlights.

3 Q. If you would go to the highlights page. If you could go to
4 page 4.

5 A. Right.

6 Q. 3 and 4.

7 A. Uh-huh.

8 Q. So 3 and 4, anyplace there where the person in wear-away
9 would be able to understand that they are not going to earn any
10 new benefits for a period of time after 1/1/96.

11 A. No. Not on the highlight page.

12 Q. So then go back to imagining a participant who is -- first
13 of all, the average participant -- withdrawn.

14 Did you consider the average participant when giving
15 approval to companywide communications that described the
16 amended plan?

17 A. Would you ask that again, please.

18 Q. Sure. You were responsible for communicating the amended
19 plan to participants, right?

20 A. Yes.

21 Q. Did you think about communicating to them at the level of
22 the average participant, what the average participant could
23 understand?

24 A. I think, yes, we did.

25 Q. How did you go about doing that?

F7mnosb2

Peck - cross

1 A. Well, I mean, we made sure that it wasn't filled with
2 complicated actuarial terms or things like that that most
3 people wouldn't be familiar with.

4 Q. You think most people --

5 A. We tried to keep it in plain English.

6 Q. Most people, were they familiar with the concept that you
7 might not earn any new benefits even though you are in a
8 pension plan for a period of time until you overcame the amount
9 you had already earned?

10 THE COURT: Why don't you rephrase that.

11 MR. GOTTESDIENER: Sure.

12 THE COURT: Whether or not the concept of wear-away,
13 however described, would be a concept you expected participants
14 to be generally familiar with.

15 THE WITNESS: Generally I don't think they would be
16 familiar with it, no.

17 THE COURT: OK. Based upon your knowledge of the
18 level of sophistication of participants in the plan back in
19 this time frame, you don't believe they would have understood
20 that concept just on their own?

21 THE WITNESS: I don't know. I think that --

22 THE COURT: Actually it was poorly worded because that
23 suggests if they were educated to understand the concept they
24 wouldn't have understood the concept.

25 I'm actually asking whether or not you think, based

F7mnosb2

Peck - cross

1 upon your understanding of the sophistication of these folks,
2 they would have had a prior understanding of at least a general
3 concept of a potential for wear-away in a pension plan. O is
4 that something --

5 THE WITNESS: I don't think they had any prior
6 knowledge about wear-away.

7 THE COURT: So they would need to be, in your view,
8 based upon your understanding of their level of sophistication,
9 would they have had to have been educated as to that concept?

10 THE WITNESS: Yes.

11 THE COURT: All right. You may proceed.

12 BY MR. GOTTESDIENER:

13 Q. And you had to be educated as to that concept?

14 A. Pardon me.

15 Q. You had to be educated as to that concept?

16 A. Yes. That's correct.

17 Q. You had no idea that that was a possibility under the plan
18 until you started attending these meetings --

19 A. Right.

20 Q. -- in February 1995, correct?

21 A. Right.

22 Q. To this day can you think of anything out in the world that
23 is akin to wear-away that the average person or you might have
24 experienced?

25 Is there any analogy?

F7mnosb2

Peck - cross

1 Is it like anything that you can think of out in the
2 world?

3 THE COURT: I don't think we need to go there. I
4 don't think that's going to be usable in any way.

5 MR. GOTTESDIENER: OK.

6 BY MR. GOTTESDIENER:

7 Q. So you know when you are giving the green light to this SPD
8 that almost everybody is in wear-away, and they are not going
9 to independently be familiar with the concept of wear-away, and
10 you approve statements that for everybody who is in wear-away
11 are false for them: Your plan benefit is based on the account
12 balance. Correct?

13 A. Yes.

14 Q. But if I understand, you contend that there is something
15 that was inserted into the SPD that you thought made it OK to
16 communicate the plan this way?

17 Is that fair?

18 A. That's fair.

19 Q. You are saying that you don't see it so far in the time
20 that we've spent --

21 A. Right.

22 Q. If you can't find it, how would the average participant in
23 your view have been able to find it?

24 A. If you sit down and read this from cover to cover, you will
25 find it.

F7mnosb2

Peck - cross

1 Q. But you said the average participant wouldn't do that,
2 right?

3 A. I don't think they would, no.

4 Q. And that was your mind set at the time you approved of this
5 going out, that the average participant wouldn't read it cover
6 to cover, correct?

7 A. Yes.

8 Q. It's fair to say that you didn't want people to understand
9 the wear-away?

10 A. No.

11 Q. You did want people to understand the wear-away. Is that
12 your testimony?

13 A. We weren't trying to hide anything, if that's what you are
14 suggesting.

15 Q. I'm asking a question. The first was you didn't really
16 want people to understand the wear-away and you said no. So
17 then, taking your answer, I said, OK, well, are you saying that
18 you actually wanted people to understand the wear-away effect?

19 MR. RUMELD: Objection.

20 THE COURT: Sustained.

21 BY MR. GOTTESDIENER:

22 Q. Did you want people to understand the wear-away effect?

23 A. Yes.

24 Q. What did you do to communicate to the average participant
25 the wear-away effect?

F7mnosb2

Peck - cross

1 A. There were people who asked for personal information as to
2 how their benefit was calculated and where -- you know, what it
3 would be as an estimate. So those people learned either from
4 the information that they received on how it was done, or, if
5 they called the HROC in Milwaukee, they could learn it there.

6 Q. My question was, what did you do? If you contend that you
7 wanted people to know, what did you do to communicate --

8 THE COURT: Why don't you ask the assumed premise of
9 that.

10 Q. First, if your response to my question is as you just gave
11 it, you would agree that your desire to communicate wear-away
12 was only to people who contacted the company?

13 A. Who asked the question, right.

14 Q. Who asked the question about wear-away?

15 A. No. About their benefits. No -- no one was talking about
16 wear-away.

17 Q. So you didn't want plan-wide, companywide to communicate
18 the wear-away. You wanted to communicate the wear-away just to
19 people who contacted the company after receiving the plan-wide
20 communications?

21 A. That's how it happened, yes.

22 Q. I'm sorry. My question isn't how it happened. My question
23 is what you wanted.

24 A. I'm forced into saying that is what I wanted, but --

25 Q. Well, you are forced into saying --

F7mnosb2

Peck - cross

1 MR. RUMELD: Can she finish her answer.

2 THE COURT: Sustained.

3 Let me just ask it this way: Do you recall giving any
4 thought to affirmatively communicating the wear-away concept to
5 all participants who were impacted by the wear-away concept?

6 THE WITNESS: Right. No, I do not.

7 THE COURT: Do you recall wanting to obscure or hide
8 the wear-away concept from people in any way?

9 THE WITNESS: No.

10 We weren't deliberately trying to hide anything.

11 THE COURT: So why, if wear-away impacted so many
12 people at this time, was it not featured prominently or in any
13 big way in the SPD?

14 THE WITNESS: Well, I guess we thought we took care of
15 it with, you know, that sentence, and because not -- it didn't
16 affect everybody. So we would be, in fact, spelling out
17 something negative that didn't apply to everybody in this
18 summary plan description.

19 THE COURT: Is it fair to say that you believed you
20 were complying with what you had to comply with, but in a
21 relatively narrowly defined way?

22 THE WITNESS: Yes.

23 We believed we met all of the requirements of the SPD
24 in this document.

25 THE COURT: All right.

F7mnosb2

Peck - cross

1 BY MR. GOTTESDIENER:

2 Q. Even though you agree that the statements in the SPD for
3 everybody who were in wear-away were false statements?

4 A. They were -- that's correct.

5 Q. And the sentence that you just referred to in answer to her
6 Honor's question, you still can't locate it?

7 A. That's not how I work. I prefer to sit and just read, and
8 I'm not comfortable doing that here.

9 MR. RUMELD: Your Honor, this is --

10 THE COURT: No she's not --

11 MR. RUMELD: I --

12 THE COURT: It's fine. I am not going to require the
13 witness to take the time right now to find it. I think
14 counsel's questions have been what they have been.

15 MR. RUMELD: I was merely going to request that
16 Mr. Gottesdiener move to his right or his left.

17 THE COURT: I'm sorry. I was responding to sort of a
18 presumed exercise that was about to occur, which we won't put
19 the witness through any further.

20 BY MR. GOTTESDIENER:

21 Q. You do agree that if you and the company had put your minds
22 to it you could have --

23 THE COURT: You don't need to go there, because it is
24 not relevant. Clearly it is the case that if they want to put
25 any words in there they can. I'm just trying to short circuit

F7mnosb2

Peck - cross

1 this now because you can't use that quote. If you are looking
2 for something that you can use, that is not useable.

3 MR. GOTTESDIENER: I'm sorry.

4 I am not sure what the Court is referring to.

5 THE COURT: If you're not sure, I strike the question.
6 Move on to the next question. You can't ask her --

7 MR. GOTTESDIENER: I'm trying to understand, your
8 Honor. I'm sorry.

9 THE COURT: I am not going to give you a tutorial on
10 examination right now.

11 MR. GOTTESDIENER: Can I ask her --

12 THE COURT: Pose a new question and I'll determine
13 whether or not it's objectionable.

14 BY MR. GOTTESDIENER:

15 Q. You agree that you could have easily explained the concept
16 of wear-away in the SPD and other mass communications?

17 A. I don't -- I think I object to the word easily, because we
18 could write the formula perhaps, but it's not easy to explain
19 to people who are not familiar with it and haven't had an
20 occasion to work with it.

21 Q. How about your pension is not going to grow for a period of
22 time while the plan transitions from one kind of formula to
23 another?

24 A. That's possible.

25 Q. Wouldn't that be an easy statement to make at the top of

F7mnosb2

Peck - cross

1 page 1 of the SPD?

2 A. Would it be? Sure, it would. But does it make sense? I
3 don't think so.

4 Q. And it doesn't make sense because it wouldn't be good news?

5 A. No. Because that's not how you start introducing a new
6 plan.

7 Q. But if the new plan isn't relevant for people for a period
8 of years and for some people will never be relevant, why
9 wouldn't that be in fact the most important thing to start
10 with?

11 A. We didn't view it that way.

12 MR. GOTTESDIENER: With the Court's indulgence.

13 Q. Page 322, line 20:

14 "Q. It is easily communicated, don't you agree?

15 "A. It could have been if -- yes."

16 You gave that testimony, correct?

17 A. Yes.

18 MR. RUMELD: I am going to object, your Honor, because
19 he's not impeaching his last question.

20 THE COURT: Well, that's true. That is actually true.
21 But I will allow it. I won't strike it because it's impeaching
22 a prior question that's relatively close.

23 BY MR. GOTTESDIENER:

24 Q. Do you agree that the message that you were not trying to
25 communicate was your pension is not going to grow until it

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Peck - cross

1 exceeds the value of your prior accrued benefit?

2 MR. RUMELD: Objection.

3 THE COURT: Sustained.

4 I think you've got basically everything that you can
5 get on this particular topic and you are well served to move on
6 to either another part of the document or to something else.

7 MR. GOTTESDIENER: Understood, your Honor.

8 BY MR. GOTTESDIENER:

9 Q. You say that you wanted people to understand wear-away, so
10 I'm understanding your testimony, is that correct?

11 A. Yes.

12 Q. But you can't point to anything in the mass communications
13 that would explain to an average participant wear-away,
14 correct?

15 A. That's correct.

16 Q. Isn't it the case that you were worried that if people
17 learned about wear-away they would react negatively?

18 A. I just think it takes more than one sentence to explain the
19 concept to people.

20 Q. OK.

21 A. So when they called or asked a question, it was easy to
22 talk to them one on one.

23 Q. And explain wear-away to them?

24 A. Well, explain the thought, the concept, yes, but not -- I
25 don't expect them to come away completely versed in wear-away.

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Peck - cross

1 Q. My question was, isn't it the case that you, the company,
2 were worried in communicating to participants that if people
3 actually got it, understood wear-away, learned about it, that
4 they would react negatively to it?

5 A. Yes. They would react negatively to it if they didn't
6 understand that they were going to get the greater of their
7 what they earned under the plan prior to 1/1/96 or whatever
8 they have under the '96 plan.

9 Q. Isn't it the case that you were concerned that if people
10 understood that they were not going to be earning new benefits
11 they would react negatively to it?

12 A. I don't think it's the case if they knew that they were
13 going to get the greater of and there was going to be a benefit
14 that was, you know, that they had earned, and they were going
15 to get that.

16 Q. Do you agree that the temporary freeze option would have
17 been very negatively received by people because they would
18 understand they weren't going to earn any additional new
19 benefits, right?

20 A. Yes.

21 Q. And under this greater of that you are describing, it's the
22 same situation, they are not going to earn any new benefits for
23 a period of time, correct?

24 MR. RUMELD: Objection.

25 THE COURT: Overruled.

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Peck - cross

1 A. Right. If they were in wear-away, they are not earning new
2 benefits.

3 Q. So you didn't want people to think that that's what was
4 going on because you didn't want that negative reaction?

5 A. Of course we didn't want a negative reaction.

6 Q. My question is, isn't it the case that you didn't actually
7 want people to understand that they were not earning new
8 benefits because you believed it would engender a negative
9 reaction?

10 MR. RUMELD: Objection.

11 THE COURT: I will allow it.

12 A. No. That's -- no. We didn't --

13 THE WITNESS: Can you read that question again.

14 THE COURT: Let me have the court reporter read the
15 question back.

16 (Record read)

17 THE COURT: Is there anything that you would like to
18 add?

19 THE WITNESS: OK.

20 So can you read the question again. Just the
21 question.

22 THE COURT: Yes. The court reporter can read the
23 question back.

24 THE WITNESS: Please. Thank you.

25 (Record read)

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Peck - cross

1 A. I need to split that apart, because we did tell people
2 about wear-away when they asked about it. So it's not like we
3 were trying to hide it.

4 Q. But you said that they didn't already know about it?

5 MR. RUMELD: Objection your Honor.

6 She's still answering the question.

7 THE COURT: She's still answering the question. Let
8 her give a complete answer. You may proceed.

9 THE WITNESS: OK.

10 A. You know, when they asked the question about their own
11 benefits we explained it to them. But I would say it's not
12 fair to generalize it that we weren't going to tell anybody
13 anything, we were going to hide this.

14 Q. Are you done with your answer?

15 A. I'm done.

16 Q. You knew people going in didn't have any idea about even
17 the concept of wear-away, right?

18 A. Correct.

19 Q. You yourself were surprised to learn that you could be
20 under a pension plan and see a growing account and it turns out
21 that that would not be any addition to your benefit?

22 A. Yes.

23 Q. And you knew that you were far more highly educated than
24 the average Woolworth participant, correct?

25 A. Well, I thought so, yes.

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Peck - cross

1 Q. This was not in your words a company of engineers or people
2 with graduate degrees?

3 A. Right.

4 Q. So you agree that there was no concerted effort made on
5 your part to explain to people that they may not be earning
6 benefits for a period of time, correct?

7 MR. RUMELD: Objection.

8 A. There wasn't --

9 THE COURT: Overruled. You may answer.

10 A. There was no widespread communication. There was only
11 one-on-one communications.

12 Q. You agree that there was no concerted effort, widespread
13 concerted effort to explain, disclose wear-away because of all
14 the ill effects that would have if it had gotten out?

15 A. No. That's not the reason.

16 Q. Page 328, line 7: Can we play the video, please.

17 MR. CARTER: I have to do it from the transcript.

18 MR. GOTTESDIENER: I'm sorry?

19 MR. CARTER: I have to do it from the transcript.

20 MR. GOTTESDIENER: I thought you had the clip.

21 MR. CARTER: It's not working.

22 MR. GOTTESDIENER: Can we take a quick break, your
23 Honor. It's important.

24 THE COURT: We can take our midmorning break now.

25 MR. RUMELD: I do want to alert your Honor that I

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Peck - cross

1 intend to pose an objection, because whether it is on the video
2 or the transcript it's not exactly the same question.

3 THE COURT: All right.

4 Why doesn't somebody show me that page of the
5 transcript. Mr. Gottesdiener, you can ask a different question
6 if it is not going to be precisely impeaching, but I don't know
7 if it is or is not, not having seen the quote yet.

8 I do see the question. So the question is, "Do you
9 agree that there was no concerted effort, widespread concerted
10 effort to explain, disclose wear-away because of all the ill
11 effects that would have" -- happened I think it is supposed to
12 say -- "if it had gotten out?"

13 There is a lot embedded in that particular question.

14 Let me just take a look at the deposition.

15 MR. RUMELD: It's page 328, line 7.

16 THE COURT: OK.

17 MR. GOTTESDIENER: The reason why we need the video
18 your Honor is they are going to contend --

19 MR. CARTER: Line 6.

20 MR. GOTTESDIENER: We need it at line 7.

21 THE COURT: Let's see.

22 Line 6 is all right.

23 The objection is noted. But let's just go ahead and
24 hear the clip.

25 (The following was played:

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Peck - cross

1 "Q. There was no concerted effort to make the wear-away -- the
2 pension freeze known because of all the ill effects it would
3 have had had it gotten out, correct?

4 "MR. RUMELD: I object to form.

5 "A. Correct.")

6 Q. You gave that testimony, didn't you?

7 A. Yes.

8 MR. GOTTESDIENER: With the Court's indulgence.

9 THE COURT: The objection to form is overruled.

10 BY MR. GOTTESDIENER:

11 Q. One of those ill effects you agree that the company would
12 have been nothing without its people and that you can't really
13 operate the company if people are miserable, correct?

14 A. Yes.

15 Q. And you agree that even if you went to people and said
16 we're going through a tough time, we are in real tough shape,
17 this is just going to be temporary but we're freezing your
18 pension benefits, you are going to kill morale?

19 A. I'm going to what?

20 Q. Kill morale.

21 A. Yes.

22 MR. GOTTESDIENER: Is this a good time for the
23 midmorning break?

24 THE COURT: I would go for another ten minutes and
25 then we will break at 11 unless somebody needs to take a break

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Peck - cross

1 now. Otherwise I would go -- we don't need to break. We will
2 take our normal break.

3 MR. GOTTESDIENER: OK. With the Court's indulgence.

4 BY MR. GOTTESDIENER:

5 Q. You agree that the decision, the affirmative decision you
6 made not to tell people about wear-away and to make the
7 statements you did in these communications, that those were
8 decisions that Foot Locker made on its own?

9 MR. RUMELD: Objection.

10 A. Or it --

11 THE COURT: Sustained.

12 You have to reask that.

13 BY MR. GOTTESDIENER:

14 Q. Didn't Mercer offer their expert services as communicators
15 to you and you turned them down?

16 A. I don't recall that they offered those consulting services
17 for communications, but they may have.

18 MR. GOTTESDIENER: Page 298, line 15:

19 "Q. And Foot Locker did not retain the services of any benefit
20 communications consultants for how to communicate with
21 employees about the conversion?

22 "A. I think that's correct, yes.

23 "Q. So services that Mercer offered during the course of the
24 actuarial consulting for the design of the conversion were
25 turned down by Foot Locker?

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Peck - cross

1 "A. Right. We were saving, not spending."

2 A. OK.

3 THE COURT: Now there is an issue with that question
4 in the deposition. It's embedding a concept which may or may
5 not have appropriate foundation, which is the very question at
6 issue, which is so the services offered. So I don't know
7 whether the services were in fact offered or not. It's
8 embedded in the question, but there's no predicate to that in
9 this piece.

10 MR. GOTTESDIENER: Your Honor, I just want to make a
11 statement that is global for the record.

12 THE COURT: Yes.

13 MR. GOTTESDIENER: That it's my understanding that on
14 cross-examination I don't have to lay a distinct foundation
15 which then allows the witness to evade what I'm getting at.

16 THE COURT: You are wrong about how you are
17 proceeding, if that is your assumption, that you can ask a
18 question that doesn't have an adequate factual foundation and
19 later cite back to that for having established the adequate
20 factual foundation.

21 If you are not, then the question is irrelevant,
22 because it goes to nothing. If you're asking the question
23 about whether or not Mercer provided services and she says, I
24 don't recall, and you impeach her where you assert that Mercer
25 provided services, no foundation, I can't use it. You can't

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Peck - cross

1 use it, Mr. Rumeld can't use it, and the appellate court can't
2 use it. So then we are wasting our time.

3 That's the issue. You can leap into things if you've
4 got a factual predicate elsewhere, but you have to build it up
5 with this witness.

6 MR. GOTTESDIENER: I do. I just want to -- so we
7 never have to come back to this, where I assert in the
8 question --

9 THE COURT: I am not going to talk about it with the
10 witness right now. We want to get this witness off the stand.
11 She's been on the stand for a very long time. Let's get her
12 off the stand so she can go back to her life.

13 BY MR. GOTTESDIENER:

14 Q. You do acknowledge now, seeing the questions and answers,
15 you are refreshed that they did offer their services for
16 communications for the conversion?

17 A. Looking at this, I would say yes.

18 Q. OK.

19 THE COURT: What I want to understand is, do you
20 recall it right now that they offered services? Do you feel
21 refreshed? Does that refresh your recollection? I want to
22 make --

23 THE WITNESS: Yeah.

24 THE COURT: -- sure we are not just basing it on
25 testimony by a lawyer, but that you in fact now recall that at

F7mnosb2

Peck - cross

1 one point in time you knew.

2 THE WITNESS: Right.

3 THE COURT: There may be a document. I think there is
4 a document.

5 MR. GOTTESDIENER: There is, your Honor.

6 THE COURT: I know, but you need to show that
7 document.

8 MR. GOTTESDIENER: I will.

9 THE COURT: All right. Let's go for it.

10 MR. HUANG: PX 207.

11 MR. GOTTESDIENER: PX 207 is on the board.

12 BY MR. GOTTESDIENER:

13 Q. Do you see that this is a letter to Tom Kiley from Jim
14 Grefig?

15 A. Yes.

16 Q. And it says, With the approaching approval of the change to
17 a cash balance format, I asked one of my colleagues in our
18 communications practice to scope a communications strategy.

19 Do you see that?

20 A. Yes.

21 Q. So does that plus the questions and answers in the
22 deposition refresh you that Mercer did offer their services and
23 you turned them down?

24 A. I haven't seen this letter before.

25 Q. That's not exactly the question.

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Peck - cross

1 THE COURT: But that needs to be the question, right?

2 MR. GOTTESDIENER: I'm asking.

3 THE COURT: This can't refresh her if she hasn't seen
4 it before. It is a physical impossibility.

5 MR. GOTTESDIENER: The rules --

6 THE COURT: Let's go ahead and take our break and talk
7 about how we are going to proceed. Counsel will stay. I am
8 going to have the witness step down and take a break. We have
9 to get ourselves to the end of this road here.

10 THE WITNESS: OK.

11 (Witness not present)

12 THE COURT: How much longer do you have,
13 Mr. Gottesdiener.

14 MR. GOTTESDIENER: I will try to finish up in a few
15 minutes. I can't predict exactly. But I certainly am getting
16 the message from the Court, and I am trying to finish it.

17 THE COURT: If you've got new material, let's go over
18 some new material.

19 MR. GOTTESDIENER: Yes.

20 THE COURT: I think at this point asking her questions
21 about state of mind, etc., etc., you have been there, you've
22 done that. Really it's what you need that's new.

23 Then I think we should wrap up Ms. Peck from the
24 plaintiffs' perspective, and see what questions the defense has
25 for examination and then move on to our next witness.

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Peck - cross

1 That is how I would like to proceed.

2 MR. GOTTESDIENER: Will do, your Honor.

3 THE COURT: All right. How much time do you think
4 right now, Mr. Rumeld? What is your best estimate?

5 MR. RUMELD: Your Honor, I know your Honor wants to
6 move things along, but Ms. Peck said a lot of things yesterday.

7 THE COURT: I understand. So I am asking for an
8 estimate, not a hard-and-fast moment.

9 MR. RUMELD: I definitely think in a best-case
10 scenario I would be done at lunchtime, being that it is going
11 to be a quarter after 11 before we start again.

12 THE COURT: All right.

13 MR. RUMELD: I have mixed feelings about whether that
14 is going to be the case.

15 THE COURT: I understand.

16 You folks have lined up whoever is to follow.

17 What was the result of the potential witnesses who the
18 plaintiff was thinking of not calling? Did you have a chance
19 to think about that?

20 MR. GOTTESDIENER: Taking the hint from your Honor, we
21 are not going to call Ms. Hartman. We are not going to call
22 Ms. Ratner.

23 THE COURT: All right. The subpoena is still out
24 there for Ms. Ratner, so presumably somebody is going to tell
25 her when to show up.

F7mnosb2

Peck - cross

1 MR. GOTTESDIENER: We didn't subpoena her, no.

2 MR. RUMELD: Ms. Ratner has been spoken to. She is my
3 partner.

4 THE COURT: OK. Who's next then after?

5 MR. GOTTESDIENER: We have two plaintiffs, two class
6 members.

7 THE COURT: Glickfield and Steven?

8 MR. GOTTESDIENER: Yes.

9 THE COURT: All right. We will hold in abeyance all
10 of the documents that will get moved into evidence, but other
11 than that, your witness testimony, the plaintiff would rest?

12 MR. GOTTESDIENER: That's right.

13 THE COURT: And so --

14 MR. RUMELD: We have ms. Derham if I understand
15 correctly, Mr. Gottesdiener asked her to come in today. Yes?

16 MR. GOTTESDIENER: Yes.

17 MR. RUMELD: I don't know now whether we will
18 definitely finish her. Obviously we will try to do that.

19 THE COURT: Ms. Derham?

20 MR. RUMELD: Correct.

21 THE COURT: All right. Fine.

22 That gives us a sense as to where we are going. Let's
23 come back in a few minutes. Thank you.

24 MR. RUMELD: Thank you, your Honor.

25 (Recess)

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Peck - cross

1 THE COURT: Let's all be seated. Mr. Gottesdiener,
2 you may proceed, sir.

3 MR. GOTTESDIENER: Thank your Honor.

4 BY MR. GOTTESDIENER:

5 Q. Ms. Peck, there is a suggestion in your declaration that
6 you communicated or didn't communicate with participants with
7 respect to the amended plan based on the advice of counsel?

8 A. Okay.

9 Q. Is that correct?

10 A. Well, any communication I sent out, I always had counsel
11 take a look at it, yes.

12 Q. Okay. But when you say any communication you sent out you
13 always had counsel take a look at it, you mean after you had --
14 withdrawn -- after it had been developed by the team and was in
15 a form that everyone was satisfied was ready to be eyeballed
16 and okayed by counsel, that is what you did?

17 MR. RUMELD: Objection.

18 THE COURT: Hold on. Sustained.

19 BY MR. GOTTESDIENER:

20 Q. You said, "Any communication I sent out, I always had
21 counsel take a look at it," right?

22 A. Yes. This is restricted to, though, not every single
23 document but, you know, important documents.

24 Q. Important documents like the ones we were talking about
25 today and yesterday?

F7MJOSB3

Peck - cross

1 A. Yes.

2 Q. The announcement letter, the highlights memo, the plan
3 statement?

4 A. Yes.

5 Q. The total compensation statement, the SPD, those
6 communications?

7 A. Yes.

8 Q. Not, by the way, these one-off communications when somebody
9 contacts the company?

10 A. Right.

11 Q. You didn't have those run by counsel?

12 A. I believe that the format for the response to the
13 participants was run by counsel.

14 Q. What is the basis for your belief?

15 A. It's just something that I think I recall that they had
16 made sure that everything they had was, you know, okay with
17 counsel.

18 Q. What you just said, they made sure. So you didn't make
19 sure?

20 A. No, I wasn't doing the letters. They were doing the
21 letters.

22 Q. The "they" you're referring to are Tom Kiley, Carol
23 Kanowicz, Marion Derham?

24 A. Right, and people in Milwaukee.

25 Q. So you don't have any personal knowledge that they actually

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Peck - cross

1 provided drafts of letters and got the okay of counsel before
2 sending them out. Is that correct?

3 A. I believe that they did, but I don't have any personal
4 knowledge, no.

5 Q. You didn't make sure that counsel looked at those letters
6 before they went out, correct?

7 A. I may have done it, but I don't recall now.

8 Q. In terms of the general communications, the SPD and the
9 other employee-wide communications, you said that you would
10 have counsel take a look at those communications before they
11 were sent out, correct?

12 A. Yes.

13 Q. Counsel was not involved in the inception of the drafts of
14 those communications or counsel was involved in the inception?
15 I'll withdraw that question and ask it differently.

16 What did you mean by take a look at it? Look over to
17 approve that it doesn't contain something wrong, that is a
18 misstatement under the law or the facts, or that it does
19 contain something that has to be in there, that kind of thing?

20 MR. RUMELD: Objection.

21 THE COURT: Sustained.

22 A. All of the above.

23 THE COURT: Sustained. Strike the answer. The answer
24 is struck. You need to go back and ask discrete questions.

25 BY MR. GOTTESDIENER:

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Peck - cross

1 Q. What did you mean by counsel take a look at them? Let's go
2 through the different documents. Tell me from your
3 recollection what role counsel played in any of the documents,
4 starting with the announcement letter?

5 A. Right. They looked at it and would give comments if it was
6 okay the way it is. If it needed some other information in it,
7 you know, just that.

8 Q. Just that?

9 A. If it was, right, if there was something missing, something
10 that needed to be there.

11 Q. Okay. So if we assume the accuracy of what's in your
12 declaration, where you say things about who provided
13 comments --

14 A. Right.

15 Q. -- in reference to some drafts and edits and so forth,
16 could you tell me what that was preceded by, these comments?

17 Were there meetings held with counsel to discuss what
18 needed to be in these communications?

19 A. I don't recall meetings, but I would have sent it to them
20 with a cover note, you know, to please take a look at this and
21 tell me if I need anything else in it.

22 Q. So let's identify the counsel you're talking about. One is
23 Ms. Clarke, who is in the room?

24 A. Yes.

25 Q. And the other is?

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Peck - cross

1 A. Gary Bahler.

2 Q. Gary Bahler? And outside counsel was Ms. Rattner and
3 Ms. Zimmerman?

4 A. Ms. Zimmerman worked for the company.

5 Q. At the time, she worked for the company?

6 A. Yes.

7 Q. So the only outside counsel that you're aware of?

8 A. Was Andrea.

9 Q. Ms. Rattner?

10 A. Yes.

11 Q. And you're saying you did not have meetings with counsel in
12 person prior to their review of these communications?

13 A. Most likely I would have sent it, but I could have stopped
14 by the office and said this is what we're doing, would you take
15 a look at it.

16 Q. Let's use the SPD as an example from the Fall of '96,
17 whenever that was actually being drafted. At that point in
18 time you knew that the wear-away had gone from being
19 anticipated one to two years, two to three years, four to five
20 years, right?

21 A. Right.

22 Q. Did you sit down or otherwise communicate to counsel, using
23 your own knowledge, Tom Kiley, Jim Grefig, did you make sure
24 that counsel understood what you knew about the length of the
25 anticipated wear-away?

F7MJOSB3

Peck - cross

1 A. I don't recall doing that, no.

2 Q. Did you get an opinion letter from counsel that the
3 approach you described was an okay and legal and lawful
4 approach to communicating with participants?

5 A. No.

6 Q. You have admitted with respect to people who were in
7 wear-away that statements made in all of these communications
8 that went company-wide that we reviewed together yesterday and
9 today, some of those statements were false, right?

10 A. Yes.

11 Q. Did you really think that counsel's silence, leaving those
12 statements in there, was telling you that it was okay to make
13 false statements to employees?

14 A. They weren't false for everybody, no, they weren't.

15 You know, they were only false for people who were in
16 wear-away.

17 Q. You didn't even as a threshold matter make sure that
18 counsel knew they were false for some sizeable number of
19 people, correct?

20 A. I didn't, but other, other people, Tom or Carol may have
21 said something.

22 Q. Tom or Carol may have, but you don't have any personal
23 knowledge that they did?

24 A. I do not.

25 Q. So I think I'm understanding that you agree that you didn't

F7MJOSB3

Peck - cross

1 take from counsel not striking certain sentences a green light
2 to make false statements to people who were in wear-away,
3 right?

4 MR. RUMELD: Objection.

5 THE COURT: Sustained.

6 BY MR. GOTTESDIENER:

7 Q. You didn't think that the lawyers were telling you that it
8 was okay to make false statements to people in wear-away?

9 A. I wasn't thinking of it that way.

10 Q. As far as you knew, the lawyers who you sent these
11 documents to, they had little, if any, understanding of
12 wear-away themselves, correct?

13 A. No, certainly not our outside counsel would know about
14 wear-away.

15 Q. You're saying outside counsel would know about wear-away?

16 A. Sure.

17 Q. However, you you don't know as a fact that outside counsel
18 did know about wear-away?

19 A. That's correct.

20 Q. Moreover, to the extent that outside counsel may have known
21 about wear-away, you know as a fact that you yourself -- and
22 you're not aware of anyone else who did this -- did not make
23 sure that outside counsel knew that wear-away could go on for
24 years and years, correct?

25 A. I did not do that, right.

F7MJOSB3

Peck - cross

1 Q. You don't know of anyone that downloading outside counsel
2 or in-house counsel, that the wear-away could last for years,
3 correct?

4 A. I don't know.

5 Q. You don't know of anyone who did that?

6 A. Right.

7 Q. So educated inside counsel knew about the risk and extent
8 of the potential wear-away, correct?

9 A. Right.

10 Q. Did you consider Foot Locker, when it was issuing these
11 communications, to be acting as a fiduciary and describing or
12 informing employees about the conversion?

13 A. A fiduciary? How do you mean that? We are fiduciaries of
14 the company because, you know, we're all officers.

15 Q. You understood your fiduciary duty -- withdrawn.

16 Fiduciary duty, could you tell us what in general that
17 means, meant to you at the time, a fiduciary duty, and then
18 we'll talk about what you said about the company?

19 A. Sure. That I wasn't approving, you know, misusing any of
20 the funds in any way, that what I was doing was appropriate.

21 Q. This is what your understanding is of a fiduciary?

22 A. Yes.

23 Q. That a fiduciary should not misuse funds that they're
24 entrusted with?

25 A. Right.

F7MJOSB3

Peck - cross

1 Q. Are you familiar with any other obligations of a fiduciary
2 other than not misappropriating or misusing funds that they're
3 entrusted with?

4 A. No.

5 Q. You said your understanding was at the time that you were a
6 fiduciary to the company?

7 A. Right.

8 Q. And the company in this circumstance as to the retirement
9 plan was the sponsor of the retirement plan, correct?

10 A. Yes.

11 Q. So your understanding was you are a fiduciary to the
12 company in its capacity as the sponsor and runner of the
13 business versus the company as the administrator of the plan?

14 MR. RUMELD: Objection.

15 THE COURT: Hold on.

16 (Pause)

17 THE COURT: Overruled.

18 BY MR. GOTTESDIENER:

19 Q. You can answer.

20 A. Would you ask it again, please.

21 Q. Sure. You were a fiduciary to the business, the company,
22 the business, correct?

23 A. Yes.

24 Q. You didn't understand your role at the time to be a
25 fiduciary to the company as the plan administrator?

F7MJOSB3

Peck - cross

1 A. Right.

2 Q. You were acting on behalf of the company as the plan
3 administrator. Is that fair?

4 A. Yes.

5 Q. You attended all the RAC committee meetings, right?

6 A. Right.

7 Q. Is that right?

8 A. Yes.

9 Q. I didn't hear your answer?

10 A. Yes.

11 Q. And in '95, at least according to the stipulation, you were
12 actually a member of the committee, but you're not recalling
13 that as I understand it?

14 A. Right, right.

15 Q. But you certainly attended, and if I understand, it was
16 kind of the interface between the board, committee and the
17 actual operation of the retirement plan was you. Is that fair?

18 A. Yes, okay.

19 Q. The original question then was phrased differently, I'm
20 understanding that you did not consider yourself and Foot
21 Locker as fiduciaries to participants when drafting and issuing
22 the communications you did?

23 A. Yes, that's right.

24 Q. Meaning you did not consider yourself a fiduciary?

25 A. To the participants, yes.

F7MJOSB3

Peck - cross

1 Q. Meaning you also did not consider the company, Woolworth,
2 Foot Locker, you didn't consider them to be a fiduciary to the
3 participants when communicating with participants, correct?

4 A. Correct.

5 Q. We touched on this briefly, but given what you've said so
6 far today and yesterday, it's fair to say that you understood
7 from the communications that went out that participants would
8 perceive the growing account balance that they were being shown
9 as showing them growth in their pension benefit?

10 A. Yes.

11 Q. And you agree that at the time you understood that for
12 anybody in wear-away, they would be mistaken if they drew the
13 conclusion that growth in their account was growth in their
14 benefit?

15 A. Yes.

16 Q. You agree that as a general matter, in circumstances where
17 bad news gets out in the workplace, that it tends to spread
18 very quickly?

19 A. Yes.

20 Q. It tends to spread, you might even say, like wildfire?

21 A. Yes.

22 Q. You, I am assuming, would agree that there was no wildfire
23 about people not earning any new benefits for a time?

24 A. Yes.

25 Q. And you agree you never heard anybody complain, an average

F7MJOSB3

Peck - cross

1 participant, hey, you froze my benefit or I didn't earn
2 benefits for a time, you never heard anything like that, right?

3 A. I did not.

4 Q. You never heard from anybody on the team or anybody at all
5 that some participants had figured out what had happened and
6 that they had not earned any new benefits?

7 A. Some people were happy to get the 12-31-95 amount, and
8 because that was higher than, obviously, nothing from the cash
9 balance.

10 Q. Okay. I hear your answer, but I think the question was
11 more focused on you never heard from any source whatsoever that
12 anybody figured out, no matter what payment they received, that
13 they had not earned benefits after the amendment went into
14 effect?

15 MR. RUMELD: Objection.

16 THE COURT: Sustained. You need to rephrase.

17 BY MR. GOTTESDIENER:

18 Q. You never learned from any source that one or more
19 participants had figured out wear-away, in effect?

20 A. I agree, I never heard that.

21 Q. This approach that you're telling us that you took with
22 respect to responding to inquiries, could you just explain to
23 us again, you agree that you made the affirmative decision not
24 to put anything explicit about wear-away in any of the
25 class-wide or company-wide communications, right?

F7MJOSB3

Peck - cross

1 A. Yes.

2 Q. You're saying, if I am understanding, there was an
3 affirmative decision to do what, wait for people to make
4 inquiries?

5 A. When people, people were calling, we gave them an 800
6 number that they could call. We also made presentations at
7 various facilities. So if people were looking for more
8 specifics regarding their personal situation, we gave it to
9 them.

10 Q. But you understood that people would not be looking for
11 specifics about wear-away?

12 A. No, we weren't using the words wear-away.

13 Q. I am sorry, I didn't mean to go back. I am asking you knew
14 that people would not be asking, you know, did I stop earning
15 benefits for a time?

16 A. I didn't put myself in their shoes. I don't know.

17 Q. So you made the decision about how to communicate with the
18 average participant without thinking about how the average
19 participant was going to receive the major communications and
20 then the kinds of inquiries they would then ask you afterwards?

21 MR. RUMELD: Objection.

22 THE COURT: Hold on. I am reading it.

23 (Pause)

24 THE COURT: Overruled. You may answer.

25 A. Can you read the question to me.

F7MJOSB3

Peck - cross

1 BY MR. GOTTESDIENER:

2 Q. So you made the decision about how to communicate with the
3 average participant about thinking how the average participant
4 was going to receive the major communications and the kind of
5 inquiries they would then ask you afterwards?

6 MR. RUMELD: Objection.

7 THE COURT: Overruled.

8 A. Yes.

9 BY MR. GOTTESDIENER:

10 Q. Meaning you agree, correct?

11 A. I agree.

12 Q. If a participant wrote to Secretary, Retirement
13 Administrative Committee, as is indicated on Page 19 of the
14 SPD -- can you get up PX-5 -- whose desk would that land on,
15 yours?

16 A. No. Somebody in the legal department was the secretary.

17 Q. The secretary to the Retirement Administration Committee?

18 A. Yes.

19 Q. But would you be involved?

20 A. Not necessarily.

21 Q. Did that ever occur?

22 A. Not that I'm aware of.

23 Q. So it is fair to say you're speculating that you don't know
24 of any time where somebody actually wrote in and addressed the
25 secretary, Retirement Administration, correct?

F7MJOSB3

Peck - cross

1 A. I do not know personally, you're right.

2 Q. You mentioned this 800 number?

3 A. Right.

4 Q. And Milwaukee. Is that right?

5 A. Right.

6 Q. Correct?

7 A. Yes.

8 Q. You know that your understanding was that the people who
9 were out there, they also received all the major communications
10 that we went through, correct?

11 A. Yes.

12 Q. And they didn't receive any special Jim Grefig, Tom Kiley
13 explanations of wear-away and how they explained that to
14 somebody who called in?

15 MR. RUMELD: Objection.

16 THE COURT: Sustained. You have to re-ask, rephrase.

17 BY MR. GOTTESDIENER:

18 Q. You know that the people who were out there in Milwaukee
19 answering phones, first of all, most of them were without much
20 formal education, correct?

21 A. Beyond high school, yes.

22 Q. You don't have any basis to believe that those people who
23 were answering those calls actually themselves understood
24 wear-away, correct?

25 A. I don't know the answer to that because they were -- I mean

F7MJOSB3

Peck - cross

1 me, Carol and Tom talked to them about how to answer these
2 questions and the formulas to use.

3 Q. Formulas?

4 A. Ah-huh.

5 Q. So, first of all, you weren't present, you don't have
6 personal knowledge what Tom and Carol told these people, if
7 they told them anything at all, correct?

8 A. That's correct.

9 Q. You know Linda Ine is, correct?

10 A. Yes.

11 Q. You never had a conversation with her about wear-away, did
12 you?

13 A. I don't recall any conversations with her about wear-away,
14 no.

15 Q. You agree that from your understanding and knowledge and
16 experience, that of anybody out there in Milwaukee, Linda Ine
17 would be the most knowledgeable person about wear-away out
18 there, correct?

19 A. Yes. She was the head of the department.

20 Q. Now, again trying to get to this communicating to people
21 who make inquiries, you would agree that the whole point of an
22 SPD is to make the plan understandable to the average
23 participant, right?

24 A. Yes.

25 Q. And it is supposed to explain, in effect, how somebody with

F7MJOSB3

Peck - cross

1 their own information could calculate their own benefit if they
2 wanted to, right?

3 A. Right.

4 Q. The whole point of the SPD, if it is doing its job, is so
5 people wouldn't have to be calling in in the first place,
6 right?

7 A. Yes, but we felt it was important to have these people
8 available to answer questions.

9 Q. But --

10 A. But that same 800 number exists today, and that is the way
11 we worked.

12 THE COURT: I thought you only had a few minutes left.
13 We have been going 40 minutes.

14 MR. GOTTESDIENER: I am sorry, your Honor?

15 THE COURT: You only had three hours and 15 left when
16 you started after the break, to let you know. You were down to
17 three hours 15 for your total time for all remaining witnesses.
18 That is now less. You are under two hours.

19 What is he at?

20 MR. GOTTESDIENER: I thought the court said at the
21 beginning of the day we were at 5.5.

22 THE COURT: And you've been -- what has he got? I
23 thought he was three hours and 15?

24 THE LAW CLERK: He was three hours.

25 THE COURT: It was five, and you spent two, so you

F7MJOSB3

Peck - cross

1 have three left now.

2 MR. GOTTESDIENER: I thought I had FIVE and
3 forty-five.

4 THE COURT: You had five, and forty-five this morning
5 when we started. It is now almost noon. It is now -- I am
6 giving you fair warning. I think this could be tied up.

7 BY MR. GOTTESDIENER:

8 Q. So you knew your approach to communicating with people was
9 you didn't owe them any duty to correct any mistaken impression
10 that they had that their growing account equaled the growing
11 benefit?

12 A. Say that again, please.

13 Q. Your approach, do you remember we talked about this in your
14 deposition, your approach in effect was caveat emptor towards
15 the employees after these communications went out, correct?

16 A. They were welcome to call or write a note if they had any
17 questions, right.

18 Q. You just answered the end of your answer was, "right."

19 You do agree that the approach you took was in effect
20 caveat emptor?

21 A. Yes.

22 Q. You never ordered any study to assess how long the
23 wear-away might last after you learned from Mercer that their
24 own estimates were going up and up, correct?

25 A. Correct.

F7MJOSB3

Peck - redirect

1 MR. GOTTESDIENER: No further questions.

2 THE COURT: Thank you. Mr. Rumeld.

3 REDIRECT EXAMINATION

4 BY MR. RUMELD:

5 Q. Good morning, Ms. Peck.

6 A. Good morning.

7 Q. How long did Roger Farah remain at Foot Locker?

8 A. He came in December of '94 and I think he left in about
9 2001 maybe, 2000 or 2001.

10 Q. After 2000 and 2001, he was no longer the source of
11 constant requests to cut costs. Is that right?

12 A. He was not, right.

13 Q. You testified earlier about the pension plan changes
14 impacting all the employees of the company. I just wanted to
15 understand, am I correct the company extends beyond the United
16 States?

17 A. Yes.

18 Q. Who did the plan apply to?

19 A. All the United States.

20 Q. Within the United States, were all the employees covered by
21 the plan?

22 A. Yes.

23 Q. Were there part-time employees in the company?

24 A. Yes.

25 Q. Were they covered by the plan?

F7MJOSB3

Peck - redirect

1 A. If they got in their thousand hours.

2 Q. If the employees had fewer than a thousand hours, they
3 weren't covered by the plan?

4 A. Right.

5 Q. Do you know if there were a lot of those employees?

6 A. Yes, there were.

7 Q. Just locally speaking, do you have a sense as to actually
8 what percentage of the total employees of the company were
9 impacted by this plan?

10 A. No, I don't, but I don't think it is very large.

11 Q. Not a large percentage?

12 A. Right.

13 Q. Could you describe what you you did after you were first
14 instructed by management to come up with changes to the pension
15 plan.

16 A. Sure. I pulled together Tom and Carol and Marion and
17 instructed them to talk with Mercer and let's find out what we
18 can do to save some money from the pension plan.

19 Q. You instructed them to talk to Mercer?

20 A. Well, I included myself there. I mean we all talked to --

21 Q. Did you all talk together all the time or did they talk
22 separately from you?

23 MR. GOTTESDIENER: Objection.

24 THE COURT: Overruled.

25 MR. GOTTESDIENER: Could I state once what my

F7MJOSB3

Peck - redirect

1 continuing objection would be then? She has testified to this.

2 THE COURT: I don't want you to say it in front of the
3 witness.

4 MR. GOTTESDIENER: Could I make the objection one
5 time?

6 THE COURT: Make the objection and we'll talk about it
7 at the break.

8 MR. GOTTESDIENER: You don't want me to explain it?

9 THE COURT: Don't explain it right now, wait until the
10 break and you can make your record. Just make sure you make
11 your record at the break. You may proceed, Mr. Rumeld.

12 BY MR. RUMELD:

13 Q. Could you explain the division of labor between yourself
14 and the rest of the team with respect to this process of coming
15 up with the plan changes?

16 MR. GOTTESDIENER: Objection.

17 A. Sure.

18 THE COURT: Overruled. How in the world could, would
19 you explain the process be an objectionable question?

20 MR. GOTTESDIENER: My position, you don't want me to
21 explain it?

22 THE COURT: Come to the sidebar. My goodness.

23 (At the sidebar)

24 THE COURT: State your objection for the record. Keep
25 your voice down. I don't want the witness to hear.

F7MJOSB3

Peck - redirect

1 MR. GOTTESDIENER: This was all covered by the direct
2 examination and it is not proper --

3 THE COURT: It is absolutely proper. When you go back
4 on cross-examination, you open up everything you touch. You
5 have touched absolutely everything I can possibly think about
6 for this witness. There is no topic that I can imagine right
7 now Mr. Rumeld can't go into.

8 MR. GOTTESDIENER: Very well, your Honor.

9 THE COURT: Okay.

10 MR. RUMELD: I will, nevertheless --

11 THE COURT: If there is one, your objection can apply
12 to that. The rest of it is certainly well within the scope.

13 (In open court)

14 THE COURT: May proceed.

15 MR. RUMELD: Would your Honor ask the court reporter
16 to read the last question back.

17 THE COURT: Yes.

18 (Record read)

19 THE WITNESS: Yes, I think you also asked if I was at
20 every Mercer meeting.

21 BY MR. RUMELD:

22 Q. Why don't you respond to the most recent question.

23 A. Okay, the most recent question is that Tom and Carol and
24 Marion were working with Mercer to come up with some
25 alternatives that I could look at and then together we could

F7MJOSB3

Peck - redirect

1 decide what we were going to go forward with.

2 Q. What were your expectations of the criteria they would use
3 in coming up with those numbers?

4 A. The criteria they would use?

5 I think mostly it was the professional opinion of the
6 actuaries, that that was the number one thing that they need.

7 Q. What were the objectives that you had in mind for these
8 proposals?

9 A. The objectives were that we would look at all of the
10 proposals that came in and then evaluate them, make sure that
11 they made sense, and then that we were going to both gain some
12 savings but also give something to the associates, which we did
13 in the form of the 401 (k).

14 Q. Why was it that you were looking to give something to the
15 associates?

16 A. Because they had been asking for quite a while for a 401
17 (k), and we hadn't provided it.

18 Also when Barry and Roger talked to us about saving
19 money and taking a fresh look at the retirement plan, it had to
20 do with, you know, a three-legged stool was what the example
21 was where a piece of retirement was the responsibility of the
22 company, a piece was the responsibility of the government, and
23 then a third piece was the responsibility of the associate.

24 Q. Now, did you view the cash balance formula as giving
25 something to the participants?

F7MJOSB3

Peck - redirect

1 A. Yes, the value there was that they got a Lump sum rather
2 than, you know, not getting an annuity until they were 65.

3 Q. So from management's perspective, were they only interested
4 in cost savings?

5 MR. GOTTESDIENER: Objection.

6 THE COURT: To the best of your understanding. You
7 can't speak, obviously, for everybody, but what you understood,
8 from being part of management yourself.

9 THE WITNESS: Right. We were definitely supposed to
10 come up with savings out of this plan that we were going to put
11 together, yes.

12 BY MR. RUMELD:

13 Q. But you also took these other considerations into account?

14 A. Yes.

15 Q. You said that you were concerned about employee morale as
16 well?

17 A. Yes.

18 Q. What about Mr. Farah, was he as concerned as you were about
19 employee morale?

20 MR. GOTTESDIENER: Objection; lack of foundation.

21 THE COURT: Just say the word, "objection."

22 Sustained.

23 BY MR. RUMELD:

24 Q. Did Mr. Farah communicate to you any concerns about
25 employee morale at this time?

F7MJOSB3

Peck - redirect

1 A. Yes, he did because, you know, he had this company to run
2 and he didn't want us to do anything that was going to cause
3 people to want to stop working or have a mass exodus or
4 anything like that.

5 Q. Now, with respect to the cost savings, what type of cost
6 savings were you looking to achieve?

7 A. We weren't given a specific dollar goal that we had to
8 save, and so we came up with this combination of the savings
9 under the plan and then the offset being the 401 (k), but
10 because we didn't have cash, we made the matching contribution
11 in the form of stock, company stock.

12 Q. At the time was your understanding that the cost savings
13 the company was looking to achieve was short-term or long-term
14 cost savings?

15 A. Long-term.

16 Q. Before Mr. Kiley and his team came up with a recommendation
17 of the cash balance formula, did you know anything about cash
18 balance plans?

19 A. Yes. As a department, we had attended some Kwasha Lipton
20 seminars on cash balance plans, and we knew that some other
21 companies like ourselves who had defined benefit plans for many
22 years were moving toward the cash balance concept.

23 Q. Before Mr. Kiley came up with this recommendation, had you
24 formed an impression about cash balance plans?

25 A. Yes. It sounded good to me because it was going to

F7MJOSB3

Peck - redirect

1 deliver, you know, lump sums to people and they wouldn't have
2 to wait, and plus we were offering the 401 (k).

3 Q. Why were lump sums so important?

4 A. Because it wasn't a group of people who made a lot of
5 money. I think the average salary was like \$22,000, and so for
6 them to be able to get extra money if they left their job, that
7 was important to them.

8 Q. Now, you did understand that the cash balance formula would
9 cost less money than the prior plan?

10 A. Yes.

11 Q. It would cost the company less money?

12 A. Yes.

13 Q. In that sense, it was a benefit cut?

14 A. Yes.

15 Q. So did you still think this was a good change for the
16 employees to go from the old formula to the new one?

17 A. Yes, because they were going to -- there is the old
18 formula, they could still get that amount of money if that
19 accrual at 12-31-95 was higher than what the cash balance was.

20 Q. Can you think of any other circumstances, in your
21 experience, where changes made to a benefit program that on the
22 one hand saves money for the company, but on the other hand you
23 would view to be a positive development for employees?

24 A. Sure. On the health side, we would change medical plans or
25 maybe we introduced HMOs frequently, so that was something

F7MJOSB3

Peck - redirect

1 where it wasn't all positive for the associate, but there were
2 more positives, the positives outweighed the negatives.

3 Q. So save money for the employer, but it had positive
4 attributes for the employees?

5 A. Right.

6 Q. Did you look at the cash balance formula the same way?

7 A. Yes. It was going to benefit the employee if they could
8 get the lump sum.

9 Q. Would you take a look at Defendant's Exhibit 140. I think
10 that is appended to your declaration.

11 MR. RUMELD: Also, your Honor, it is also PX-84.

12 THE COURT: All right.

13 BY MR. RUMELD:

14 Q. Do you have it in front of you, Ms. Peck?

15 A. Yes, it is on the screen.

16 Q. It is a little hard to read on the screen. Do you
17 recognize the document?

18 A. Yes. Those are my notes from the meeting that I attended.

19 Q. Your notes identify a number of people by first name on the
20 second line there?

21 A. Yes.

22 Q. Who are those people?

23 A. Andrea Rattner from Proskauer, Rina Zimmerman who worked
24 for Foot Locker, Mark Brandeis from Mercer, Tom Kiley from Foot
25 Locker, Carol Kanowicz from Foot Locker, and I'm not sure, I

F7MJOSB3

Peck - redirect

1 think that was Carol Bahler from Foot Locker in Camp Hill.

2 (Continued on next page)

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F7mnosb4

Peck - redirect

1 Q. Could you just review these notes for purposes of telling
2 me whether they discuss any proposal other than the cash
3 balance proposal.

4 A. Well, you mean at this meeting?

5 Q. Yes.

6 A. This was -- we were talking about the cash balance at this
7 meeting.

8 Q. And were you talking about anything else?

9 A. Well, you see that last sentence, where we talked about
10 partial plan terminations, we talked about that and the fact
11 that we didn't feel that this qualified as a partial plan
12 termination.

13 Q. In your experience under what circumstances would these
14 people Andrea Ratner, Rina Traub, and the other people you
15 mentioned attend a meeting like this?

16 MR. GOTTESDIENER: Objection.

17 A. Well --

18 THE COURT: Overruled. You may answer.

19 A. OK. Rina was our in-house attorney, so -- benefits
20 attorney, so that's why she was there, because we were
21 discussing benefits, and Andrea I believe was the Proskauer
22 person that Gary or Rina or Sheila would talk to when they
23 wanted to talk to -- I believe, I am not sure of this, but I
24 think she was a partner, you know, so that's how come Andrea
25 was involved.

F7mnosb4

Peck - redirect

1 Q. Does the fact that they are attending this meeting tell you
2 anything about the status of this proposal?

3 A. That this is what we wanted to go forward with. And, you
4 know, we were looking for input from them if they had any
5 reasons to think that we shouldn't do it.

6 Q. If you could look at the second page of your notes there,
7 towards the bottom, do you see where it says perhaps?

8 A. Yes.

9 Q. Can you tell us what that says.

10 A. Perhaps cash balance 7/1/95. Very -- I can't really see
11 that word. OK. Thank you. I don't know what that word is,
12 A-d-j. Then we went on to talk about the 401(k), 1/1/96.

13 Q. What is your understanding of that line about the cash
14 balance?

15 A. Very -- as of 7/1/95. I don't know what those last three
16 letters are. I'm sorry.

17 Q. Do you know why you are writing 7/1/95?

18 A. I think this was all a discussion, if I recall, it was all
19 a discussion with Jim and Mark about the cash balance and
20 interest rates and interest rates having an effect on how we
21 would value someone's credits.

22 Q. How does the July 1 date come into the picture, if you
23 know. If you don't remember, that's OK.

24 A. I don't know.

25 MR. RUMELD: One moment.

F7mnosb4

Peck - redirect

1 A. I will bet that means aggressive, very aggressive.

2 Q. Let's take a look at Defendant's Exhibit 143 for a moment.

3 MR. RUMELD: May I approach, your Honor?

4 THE COURT: Yes.

5 THE WITNESS: Thank you.

6 MR. RUMELD: I think you have it.

7 THE COURT: I have it. Thank you.

8 BY MR. RUMELD:

9 Q. Do you recognize these notes?

10 A. Yes. They are Tom's notes.

11 Q. They are his notes of the same meeting, right?

12 A. Right, yes.

13 Q. February 2?

14 THE COURT: Is this 41? I am just trying to remember.

15 MR. HUANG: PX 21, your Honor.

16 THE COURT: 21. Thank you.

17 Q. Do you see at the very end of his notes in the last
18 paragraph it says, Target 7/1/95 to implement cash balance? Do
19 you see that?

20 A. Yes, I do.

21 Q. Does that help your recollection at all as to what the
22 7/1/95 may mean?

23 A. Oh, if we were -- if we moved up the implementation date
24 from '96, moved it back to '95. That explains, that's why my
25 notes said very aggressive. It would be very aggressive to try

F7mnosb4

Peck - redirect

1 to get it all done.

2 Q. Is it your understanding that as of this time you were at
3 least thinking about possibly implementing this July 1, 1995?

4 A. Yes.

5 Q. Let's go back to Defendant's Exhibit 140, your notes?

6 A. Yes.

7 Q. I think you testified that Tom may have made this
8 presentation concerning the wear-away effect?

9 A. I think it was -- yes. Correct. Tom with assistance from
10 Mark.

11 Q. If Tom was making the presentation, you saw his notes?

12 A. Yes.

13 MR. RUMELD: Let's go back to his notes for a second,
14 the other exhibit.

15 Q. If you look at the second page there, he's seemingly
16 describing an example of the effect of wear-away.

17 Do you see that?

18 A. Yes.

19 Q. If he were making a presentation, would he be writing these
20 notes down?

21 A. Yes.

22 Q. Even if he was making a presentation?

23 A. Yes.

24 Q. Sorry to do this. Let's go back to your notes, Defendant's
25 Exhibit 140.

F7mnosb4

Peck - redirect

1 Looking at the middle of the page, could you tell me
2 your understanding of what your notes are saying there. Do you
3 see where it says pay credit one and a quarter, six and a
4 quarter, ten percent?

5 A. Yes.

6 Q. What are you describing there?

7 A. Those were alternatives for increasing the pay credits as
8 people got older.

9 Q. What do the pay credits relate to?

10 A. A person's annual compensation.

11 Q. My question is too ambiguous. What plan formula is being
12 described here?

13 A. The cash balance formula.

14 Q. How does that compare to the formula that was in effect at
15 the time?

16 A. It was -- lowered the benefit, but provided cash.

17 Q. What type of benefit formula existed before the cash
18 balance plan?

19 A. It was accruals.

20 Q. It was accruals based on what criteria? Do you know?

21 A. Compensation again.

22 Q. Based on compensation and also based on service? Do you
23 remember?

24 A. No. I think we only did that here.

25 Q. I see.

F7mnosb4

Peck - redirect

1 THE COURT: Was it called a career average?

2 THE WITNESS: Career average plan.

3 THE COURT: All right.

4 THE WITNESS: Right.

5 BY MR. RUMELD:

6 Q. Your notes to the right, what do they say?

7 A. Replicates existing plan benefit, interest at 5 percent.

8 Q. What does that mean?

9 A. That if we used this formula for pay credits, one and a
10 quarter, six and a quarter, ten percent depending on the age
11 grouping, that would replicate the existing benefit interest at
12 five percent.

13 Q. And replicate the existing benefit how?

14 A. In terms of what the amount of the benefit would be. That
15 is all.

16 Q. How does it relate to the company's costs?

17 A. Well, it increases our cost.

18 Q. If it replicates it increases?

19 A. No. I'm sorry. If it replicates the existing benefit,
20 then it would be exactly even.

21 Q. The cost would be the same?

22 A. Right.

23 Q. Now, could we scroll down a couple of lines.

24 A. Right, yes.

25 Q. Can you read where it says, Going forward?

F7mnosb4

Peck - redirect

1 A. Going forward for 20 percent savings, change pay credits,
2 change the pay credits to 1 percent, 5 percent, and 8 percent.

3 Q. What does that mean?

4 A. If we want to increase our savings, we lower the pay
5 credits.

6 Q. So as of this point in time, what was your understanding as
7 to how the cash balance plan would save the company money?

8 A. As a function of the, what we gave them in pay credits. So
9 these were different alternatives to how much we were going to
10 save.

11 Q. Underneath there, there is a discussion of the 9 percent
12 interest rate.

13 Do you see that?

14 A. Right.

15 Q. Is this when you first learned about what's been referred
16 to as wear-away?

17 A. Yes. I would say yes.

18 Q. Then on the next page you have that little chart with an
19 example?

20 A. Yeah.

21 Q. Before this meeting, did you have any understanding of
22 wear-away?

23 A. No.

24 Q. After this meeting, what was your understanding of
25 wear-away?

F7mnosb4

Peck - redirect

1 A. What was my understanding?

2 Q. Yes.

3 A. Well, that, you know, there was going to be a time period
4 when people would not be increasing their pension amounts, and
5 then -- you know, I mean -- that's what -- what else?

6 Q. Could you explain a little further why they wouldn't be
7 increasing their pension amounts?

8 A. Oh, because their accrued benefit from 12/31/95 is actually
9 higher.

10 Q. At the time did you view this wear-away effect as being a
11 means to achieve cost savings?

12 A. No. No, we weren't thinking of it that way at all.

13 Q. At the time were you thinking of this in terms of the
14 growth in the account balance not counting?

15 A. No.

16 Q. Were you thinking of it as a freeze?

17 A. Not at all.

18 Q. Did the explanation of wear-away influence in any way the
19 decision as to whether to proceed with the cash balance
20 formula?

21 A. No. We went ahead knowing that.

22 Q. What is the function of the 9 percent interest rate?

23 A. What is the function of the 9 percent? Oh, the accrued
24 amounts were factored at 9 percent to come up with an opening
25 balance.

F7mnosb4

Peck - redirect

1 Q. So it was used to calculate the opening balance?

2 A. Right.

3 Q. Where did the numerical rate come from?

4 A. I think it was a recommendation from Jim and Mark.

5 Q. Do you remember whether anyone ever questioned the use of
6 that rate?

7 A. I do not remember it being questioned.

8 Q. Was there ever a recommendation to use a different rate?

9 A. Not that I recall.

10 Q. Now, how does the 9 percent contribute to the wear-away
11 effect?

12 A. How does the 9 percent -- well, I can't explain that.

13 Q. Under what circumstances does it happen that the
14 participant receives a benefit based on the pre-1996 accrued
15 benefit?

16 A. If when we -- if the interest rates change, and they do
17 every year usually, then it would affect the benefit that we
18 were going to give them credit for.

19 Q. What interest rate are you talking about now?

20 A. Well, like, see that 7.83. That was the GATT rate at that
21 time.

22 Q. Right. So there is a difference between the 7.83 and the 9
23 percent?

24 A. And the 9 percent, right.

25 Q. Right. Your understanding is that because that rate is

F7mnosb4

Peck - redirect

1 lower, a participant could experience wear-away?

2 A. Yes.

3 Q. I think you testified yesterday that you could have chosen
4 to use the same 7.83 percent to calculate the starting balance?

5 A. Yes.

6 Q. At what point in time do you apply the GATT rate for
7 purposes of determining what the pre-'96 benefit is worth?

8 A. I don't know the answer to that.

9 Q. You understand there is a minimum lump sum?

10 A. Yes.

11 Q. What does the minimum lump sum correspond to?

12 A. The minimum lump sum is the minimum that an individual
13 would get.

14 Q. What is it based on?

15 A. What is it based on? The person's earnings and what they
16 have accrued.

17 Q. Accrued under which formula?

18 A. Under the old formula.

19 Q. When is that minimum lump sum calculation performed?

20 A. At the end of the year, after the interest rates come out.

21 Q. If a participant is still working, do you make a minimum
22 lump sum calculation?

23 A. We would probably tell them that they, you know, we're
24 waiting for interest rates before we do the calculation.

25 Q. When can a participant first take a lump sum?

F7mnosb4

Peck - redirect

1 A. Today.

2 Q. Well, if an employee is still working, can he take a lump
3 sum?

4 A. Yes.

5 Q. While he's working?

6 A. Oh, no, no, when he terminates.

7 Q. So his entitlement to a lump sum arises when he's
8 terminating his employment?

9 A. Right.

10 Q. When is the minimum lump sum calculation made?

11 A. I don't know exactly.

12 Q. Do you know what the impact on the company's cost -- do you
13 know what the impact is on the amount of the minimum lump sum
14 if those GATT rates go down?

15 A. Well, when the rates go down the, you know, the inverse is
16 true for the benefit.

17 Q. The size of the benefit goes up?

18 A. Right.

19 Q. What is the impact on the company?

20 A. It increases the cost.

21 Q. Because the company pays those lump sums?

22 A. Right.

23 Q. Could we take a look again at Plaintiff's Exhibit 300. You
24 may still have a copy there. We looked at this before.

25 Do you remember that this morning, with

F7mnosb4

Peck - redirect

1 Mr. Gottesdiener?

2 A. Not today.

3 Q. Do you understand what this document is showing? It's
4 addressed to you, right?

5 A. Yes. Tom sent it to me.

6 Q. Do you see it's showing current year lump sums greater than
7 \$3500?

8 A. Right.

9 Q. What is the significance of the reference to \$3500?

10 A. If people had a pension benefit that was under \$3500, we
11 cashed them out.

12 Q. Was that true on under the old plan or the new plan?

13 A. Under the old plan.

14 Q. Under the old plan, if you had more than \$3500, could you
15 obtain a lump sum?

16 A. No.

17 Q. Only under the new plan?

18 A. Only under the new plan.

19 Q. So current year lump sums greater than \$3500, those would
20 be lump sums available only under the new plan?

21 A. I guess so, yes.

22 Q. And this memo is showing that there were over \$23 million
23 in lump sum payments in 1996?

24 A. Right.

25 Q. For these over \$3500 people?

F7mnosb4

Peck - redirect

1 A. For anybody over \$3500, right.

2 Q. Do you think that is a significant sum?

3 A. Yes, I do.

4 Q. So, from a cost standpoint, would you agree that the
5 company in fact incurred a lot of cost by virtue of this lump
6 sum option?

7 A. Yes.

8 Q. Sitting here now, do you know whether the company actually
9 saved money or lost money by virtue of participants electing a
10 lump sum?

11 A. I think it cost the company money.

12 Q. Who would be the best person to answer that question?

13 A. Probably the actuaries.

14 MR. GOTTESDIENER: Objection, your Honor.

15 THE COURT: Now, I'll allow her understanding as to
16 who the person would be.

17 Probably the actuaries?

18 THE WITNESS: The actuaries.

19 THE COURT: Do you mean inside the company, somebody
20 with actuarial experience, such as Mr. Kiley or the Mercer
21 folks?

22 THE WITNESS: The Mercer folks.

23 BY MR. RUMELD:

24 Q. It would be somebody other than you I take it?

25 A. Yes, definitely.

F7mnosb4

Peck - redirect

1 Q. We looked at your notes of the meetings you attended with
2 Mercer.

3 A. Uh-huh.

4 Q. Do you remember whether you attended additional meetings
5 with Mercer after February to discuss the cash balance
6 proposal?

7 A. I think it was at least one other meeting where Jim Grefig
8 was present.

9 Q. Generally speaking, would you take notes if you attended a
10 meeting like this?

11 A. Generally, yes.

12 Q. Would it be consistent with your practice that other
13 members of the group would attend more meetings with Mercer?

14 A. Yes, definitely.

15 Q. Why was that?

16 A. Because they were working on this every day trying to get
17 this done. So there were -- I had other things that I had to
18 be working on as well. So I left Tom and Carol to do the
19 pension work, and so they had meetings without me with Mercer.

20 Q. You testified earlier about the presentations that were
21 made to management.

22 Do you remember that?

23 A. Yes.

24 Q. How would you describe your role as it related to those
25 presentations?

F7mnosb4

Peck - redirect

1 A. Well, most of the presentations were put together by Tom
2 and Carol with Mercer. Then they would -- excuse me, then they
3 would review them with me and give me an opportunity to ask
4 questions, and then I had to present them to Barry and then
5 Barry took it higher generally.

6 Q. When the materials were presented to you, you had an
7 opportunity to make changes?

8 A. If there was -- yes, I did.

9 Q. What types of changes would you make?

10 A. Mostly it was editorial changes, you know, format changes
11 or that kind of thing.

12 Q. You didn't make any substantive changes?

13 A. No substantive changes, no.

14 Q. Why not?

15 A. Because I didn't do all the work that went behind it, so I
16 trusted the actuary and Tom to do that.

17 MR. RUMELD: May I approach, your Honor. I would like
18 to give the witness Defendant's Exhibit 199.

19 THE COURT: Yes.

20 THE WITNESS: Thank you.

21 MR. HUANG: This is PX 17, your Honor.

22 THE COURT: 17.

23 BY MR. RUMELD:

24 Q. You say that the draft -- this is a June 30, 1995 draft,
25 the presentation materials.

F7mnosb4

Peck - redirect

1 Do you see that?

2 A. Yes.

3 Q. Do you recognize any of the handwriting on here?

4 A. Well, on that background page, that would be -- that's my
5 handwriting, that we need the same information for the Kinney
6 plan.

7 Q. Do you see your handwriting anywhere else in this document?

8 A. On the next page, the average salary, you know, that word
9 average, and then age bands on the bottom.

10 Q. If you flip through the document, you will see there are
11 some other handwritten comments.

12 Could you let the Court know whether all of them are
13 your changes.

14 A. Sure. Yes, they are all mine.

15 Q. Are these changes consistent with your recollection of the
16 type of changes you generally made when you reviewed these
17 presentation materials?

18 A. Right. And they are not all changes. Some of them are
19 just questions.

20 Q. Right.

21 A. Yes.

22 Q. But what you see here is consistent with your recollection?

23 A. Yes, uh-huh.

24 Q. All right. Could you take a look at Defendant's Exhibit
25 38, which I think is attached to your declaration.

F7mnosb4

Peck - redirect

1 MR. RUMELD: It is also PX 10, your Honor.

2 I'm sorry. It's not attached to your declaration.

3 May I approach?

4 THE COURT: Yes.

5 THE WITNESS: Thank you.

6 BY MR. RUMELD:

7 Q. Let me ask you first, Ms. Peck, if you would turn to --
8 it's about the seventh page. It's the document that's Bates
9 stamped 5462 on the bottom.

10 A. 5462, OK.

11 Q. If you look all the way on the top, there is some sort of
12 fax number there, and then it says page 2 on the right.

13 A. Yes.

14 Q. Do you see that?

15 Are you able to tell from looking at that whether
16 these presentation materials are in a finalized form so that
17 they would have been presented as is?

18 A. I would think so, because they came from Mercer.

19 Q. Right. But if you were making a presentation to your
20 superiors, would you use documents that had those fax numbers
21 on the top and no page numbers on the bottom?

22 A. Well, it's possible. It happened.

23 Q. Could you turn to the second page. It's 5457 on the
24 bottom.

25 A. OK.

F7mnosb4

Peck - redirect

1 Q. There is the statement of objective there?

2 A. Yes.

3 Q. Is this a page that you would have reviewed carefully
4 before the presentation?

5 A. Yes.

6 Q. It says there that the objective is to decrease long-term
7 company cost.

8 Do you see that?

9 A. Yes.

10 Q. Is there any reason not to think that as of this time you
11 viewed the objective as being to save long-term costs?

12 A. Yes.

13 Q. Is that --

14 A. No. There's no reason to --

15 Q. As of this time, what was your understanding as to how the
16 long-term costs would be reduced?

17 A. Well, there is a number of things that are involved in the
18 pension other than just the actual amount of the benefits. So,
19 you know, there are other expenses that go with it. So we
20 would reduce the PBGC expense, for instance, because we would
21 have fewer participants perhaps, and then -- you know, things
22 like that, other expenses that are dependent on the number of
23 participants.

24 Q. You started your response by referring to other things
25 besides the benefits.

F7mnosb4

Peck - redirect

1 A. Right.

2 Q. Did the benefits impact the cost reduction?

3 A. Ask me that question again, please.

4 Q. OK. You were recommending a change in the formula, right?

5 A. Right.

6 Q. Did you have an understanding as to whether the change in
7 the formula was going to have an impact on the cost?

8 A. Yes. I think I understood that it would have an impact on
9 the cost and lower it. Uh-huh.

10 Q. OK. If you remember, in your notes, it referred to this 20
11 percent reduction in cost?

12 A. Right.

13 Q. Is that what you had in mind when these objectives were
14 being prepared?

15 A. Well, I didn't think we were going to go that far with 20
16 percent, but that's, you know, a possibility.

17 Q. But did you have an understanding that the pay credits on
18 the formula, on the cash balance formula would be set in a way
19 that there would be some cost savings?

20 A. Yes.

21 Q. Would you look at page 5461.

22 A. OK.

23 MR. RUMELD: That's not it. 5461 on the bottom. OK.

24 If you could make that a little larger.

25 Q. Do you understand what the materials on the right depict

F7mnosb4

Peck - redirect

1 under cash balance plan?

2 A. Yeah. You mean the percent of pay or the formula for the
3 years of service, or what do you --

4 Q. Right. What is that showing?

5 A. It's showing that for associates who have basically up to
6 ten years of service that they would get 1 percent of the first
7 10,800 of their pay plus .85 percent of pay in excess of
8 \$22,000.

9 Q. Is this a description of formula that's being contemplated
10 at this time?

11 A. At that time, yes.

12 Q. Underneath there is a description of the impact of that
13 formula on the cost, is that right?

14 A. Right, the normal -- uh-huh.

15 Q. Do you see anything in here that has to do with the
16 methodology for determining the starting balance for the use of
17 that 9 percent interest rate?

18 A. Well, my notes say that the normal cost to fund the current
19 accruals, if that's what you're referring to.

20 Q. Do you see anything in the materials that specifically
21 refers to how the initial account balance is going to be
22 calculated?

23 A. No.

24 Q. If you thumb through these materials, can you let me know
25 whether you see any discussion of wear-away in here?

F7mnosb4

Peck - redirect

1 A. OK. It's not going to be there.

2 Q. You already know that?

3 A. Right.

4 Q. Because you have looked at these materials before?

5 A. I have looked at the materials before. I'll finish going
6 through it before I --

7 (Pause)

8 A. No, I don't see anything about wear-away.

9 Q. OK. Do you see anything in there about achieving savings
10 through the election of lump sums?

11 A. No.

12 Q. So, when you testified yesterday that you thought one of
13 the ways the company was going to save costs was by encouraging
14 everyone to take lump sums -- do you remember that testimony?

15 A. Yes.

16 Q. Would that be something that would be included within these
17 presentation materials at the time you thought that was one of
18 the means to save costs?

19 MR. GOTTESDIENER: Objection.

20 THE COURT: Hold on.

21 Sustained.

22 BY MR. RUMELD:

23 Q. When you reviewed these presentation materials, did you try
24 and make sure they contain anything that you thought was
25 important?

F7mnosb4

Peck - redirect

1 A. Would I what?

2 Q. Try to make sure they contained anything that you
3 considered important at the time?

4 A. Yes.

5 Q. Could you look at DX 249.

6 MR. RUMELD: May I approach?

7 THE COURT: You may.

8 MR. RUMELD: It is also PX 227.

9 THE WITNESS: Thank you.

10 BY MR. RUMELD:

11 Q. This is a draft dated June 16, 1995. Do you see that?

12 A. Yes.

13 Q. If you turn to the third page, where it lists the
14 objectives?

15 A. Yes.

16 Q. It says next to the first asterisk, To decrease long-term
17 company cost by an estimated 20 percent per year.

18 Do you see that?

19 A. Yes.

20 Q. Is there any reason not to think that at this time you were
21 still trying to obtain a 20 percent cost reduction?

22 A. No.

23 Q. It refers to a 20 percent reduction per year. Do you see
24 that?

25 A. Yes.

F7mnosb4

Peck - redirect

1 Q. Is there any reason not to think that the method that you
2 had in mind for achieving that reduction would be the same
3 method that was outlined back at that February meeting that you
4 attended?

5 A. I'm sorry. I didn't hear it.

6 Q. Is there any reason not to think that the way of achieving
7 that 20 percent reduction that you had in mind was the method
8 that was described to you back in February?

9 A. No. There's no reason.

10 MR. RUMELD: Just one moment, your Honor.

11 THE COURT: All right.

12 BY MR. RUMELD:

13 Q. Could you look at Defendant's Exhibit 38. I think that is
14 attached --

15 MR. RUMELD: That's the May 1 one.

16 I just brought it up to you.

17 THE COURT: PX 10?

18 MR. RUMELD: Right.

19 BY MR. RUMELD:

20 Q. Do you have DX 38?

21 A. Yes.

22 Q. If you turn to the third page there. This is the version
23 of the slide deck that's dated May 1, 1995.

24 Do you see that?

25 A. OK.

F7mnosb4

Peck - redirect

1 Q. On the third page do you see there is a listing of
2 alternatives?

3 A. OK.

4 Q. What is your understanding of why this page is presented
5 this way?

6 A. Let me make sure I'm on the same thing. You are on 458?

7 Q. Correct.

8 A. OK. Why was it presented this way?

9 Q. What is your understanding of what this list of
10 alternatives was?

11 A. These were things that the committee or the task force
12 was -- had looked at, and, you know, came up with things that
13 they could have done and what it would have cost.

14 Q. Is there any reason why this list would have omitted an
15 alternative that the task force looked at seriously?

16 A. I think only if -- no, I don't think so. Except for
17 freezes. We weren't putting in freezes.

18 Q. Mr. Gottesdiener asked you yesterday about a proposal to
19 add a lump sum option to the existing plan formula.

20 Do you see that proposal listed here?

21 A. No.

22 Q. I'm sorry. Did you answer no?

23 A. No.

24 Q. You don't see it there?

25 A. No.

F7mnosb4

Peck - redirect

1 Q. Any reason why it would not be listed if it was a proposal
2 that was being seriously considered at the time?

3 A. If it was considered, it should be there, but I don't
4 remember it being considered.

5 Q. Would you like now at DX 41. It should be attached to your
6 declaration.

7 MR. RUMELD: And it is also PX 101, your Honor.

8 THE COURT: All right. Thank you.

9 BY MR. RUMELD:

10 Q. This is the --

11 A. Excuse me, Mr. Rumeld. What do you want us to look at?

12 Q. It's Exhibit 41 to your declaration.

13 A. OK.

14 Q. That starts with the July 19 memorandum.

15 A. No. I'm in the wrong place. I'm sorry.

16 MR. RUMELD: May I approach, your Honor?

17 THE COURT: You may.

18 MR. RUMELD: I will just give her -- just take this
19 one.

20 THE WITNESS: OK. Thanks.

21 BY MR. RUMELD:

22 Q. Now, am I correct these are the presentation materials that
23 actually went to senior management, is that right?

24 A. That's right.

25 Q. Could you look on page 7, which is the page with the

F7mnosb4

Peck - redirect

1 recommendations.

2 A. Yes.

3 Q. Is this something you would have reviewed carefully before
4 it was sent out to senior management?

5 A. Yes.

6 Q. These reflect what your recommendations were at the time,
7 is that right?

8 A. Yes.

9 Q. So if you look on the first bulleted point three lines from
10 the bottom.

11 A. Merge the Kinney plan with the Woolworth plan.

12 Q. No. Sort of that first paragraph three lines from the
13 bottom.

14 A. Uh-huh.

15 Q. It says, Reduces future benefit accruals and lowers future
16 costs.

17 Do you see that?

18 A. Oh, I see in the first, yes. OK, got it.

19 Q. OK. What's your understanding of that?

20 A. There won't be as much money that we need to accrue a
21 benefit for, and so that will lower the future cost.

22 Q. Why won't there be as much money that you need to accrue a
23 benefit for?

24 A. That's the effect of changing to the cash balance.

25 Q. How would you describe the effect of wear-away?

F7mnosb4

Peck - redirect

1 MR. GOTTESDIENER: Objection.

2 THE COURT: Sustained.

3 In terms of what? In connection with this, or do you
4 just want to get a general explanation.

5 Q. What does wear-away do to benefit accruals?

6 MR. GOTTESDIENER: Objection.

7 THE COURT: I will allow it.

8 You may answer.

9 THE WITNESS: OK.

10 A. Can you ask it again now.

11 Q. When a participant is in wear-away --

12 A. Right.

13 Q. -- what happens to the participant's benefit accruals?

14 A. They go down.

15 Q. They go down, or they just don't go up?

16 A. Well, they don't go up.

17 Q. They remain the same?

18 A. Right.

19 Q. Right?

20 A. Right.

21 Q. That's why it's been suggested to you that it's like a
22 benefit freeze, is that right?

23 MR. GOTTESDIENER: Objection.

24 THE COURT: You can't lead her quite so much.

25 Let's try that again.

F7mnosb4

Peck - redirect

1 I'm concerned that we may have your testimony and not
2 hers in the last set of answers.

3 MR. RUMELD: I understand.

4 THE COURT: We'll strike those.

5 MR. RUMELD: Let me ask this question.

6 BY MR. RUMELD:

7 Q. Do you believe that the reference to reducing future
8 benefit accruals has anything to do with the wear-away?

9 MR. GOTTESDIENER: Objection.

10 THE COURT: I will allow it.

11 Overruled.

12 THE WITNESS: Can you read it to me again.

13 THE COURT: The court reporter may read back the
14 question. Thank you.

15 (Record read)

16 A. OK. Yes, I do.

17 Q. OK. It doesn't say suspending benefit accruals, does it?

18 A. No.

19 Q. Would you characterize wear-away as the suspension of
20 benefit accruals or reduction of benefit accruals?

21 A. A reduction.

22 Q. Why would not characterize it as a suspension if accruals
23 are not increasing?

24 MR. GOTTESDIENER: Objection.

25 THE COURT: Overruled.

F7mnosb4

Peck - redirect

1 A. Because the hope is the person's not going to be in
2 wear-away forever.

3 Q. Right?

4 A. So --

5 Q. Eventually --

6 A. Eventually --

7 Q. -- the benefits --

8 MR. GOTTESDIENER: Let her answer.

9 THE COURT: Let her answer.

10 MR. RUMELD: Sorry. Strike that.

11 A. The person is not going to be in wear-away forever, and
12 then the benefit accruals will pick up again.

13 Q. For the period that people are in wear-away, would there be
14 a suspension of benefit accruals or a reduction in benefit
15 accruals?

16 MR. GOTTESDIENER: Objection.

17 THE COURT: I will allow it. You may answer.

18 THE WITNESS: OK.

19 A. During the wear-away period there is, I think there is a
20 suspension.

21 THE COURT: Now in just a few minutes, just so you are
22 aware, Mr. Rumeld, we are going to be breaking for lunch.

23 BY MR. RUMELD:

24 Q. You previously identified Mr. Kiley's handwriting on this
25 document.

F7mnosb4

Peck - redirect

1 Do you remember that?

2 A. Yes.

3 Q. Can you turn to the next page.

4 This was a meeting with senior management, is that
5 right?

6 A. Right.

7 Q. So would it have been your practice to make a presentation
8 like this to senior management and have Mr. Kiley accompany
9 you, or would Mr. Kiley make a presentation like this?

10 A. He would have made -- I believe he would have made this
11 one, this presentation, yes.

12 Q. Is there anything in particular that leads you to say that?

13 A. Well, because of all of the -- this is the culmination of
14 all the work that they had been doing as a committee, and so I
15 think that he would have made this presentation.

16 THE COURT: Since we've left behind I think the PX or
17 DX number do you want to just recite that for the record.

18 MR. RUMELD: I think it's DX 41, your Honor.

19 THE COURT: All right.

20 Thank you.

21 BY MR. RUMELD:

22 Q. Could we look back at your notes, which was DX 140.

23 It should be attached to your notebook. It should be
24 the last tab to your notebook. You'll see your notes.

25 A. OK. I see it. OK. I have it.

F7mnosb4

Peck - redirect

1 Q. The tabs correspond to the exhibit numbers, so that's why
2 they don't go 1, 2, 3.

3 You have your notes in front of you?

4 A. I have the notes in front of me, yes.

5 Q. Do they contain any information about how long the
6 wear-away period would last?

7 A. No.

8 Q. I think you testified to your recollection that at some
9 point you learned that wear-away was expected to last two to
10 three years?

11 A. In the beginning, right.

12 Q. Sitting here now, do you actually remember learning that
13 there was a specific period of time that wear-away was expected
14 to last?

15 MR. GOTTESDIENER: Objection.

16 THE COURT: Overruled.

17 A. That's where that, you know, two years came from.

18 Q. Right. But do you actually remember being in a meeting or
19 having a discussion with anyone in particular about it?

20 A. I think that was one of the first things that Jim Grefig
21 presented to us.

22 Q. Right. But this meeting was the first time he presented
23 about wear-away, is that right?

24 A. Pardon me?

25 Q. This meeting, this February meeting was the first

F7mnosb4

Peck - redirect

1 presentation about wear-away?

2 A. Right.

3 Q. So it wasn't at that meeting?

4 MR. GOTTESDIENER: Objection.

5 THE COURT: Sustained.

6 I think you need to do it a little bit differently.

7 MR. RUMELD: Apologies.

8 BY MR. RUMELD:

9 Q. If Mr. Grefig had commented on the length of wear-away at
10 this meeting, do you think it would be in your notes?

11 A. Well, it probably should be, but I don't think it's there.

12 THE COURT: Did you have a practice of taking verbatim
13 notes or something less than that in terms of when you were
14 sitting at a meeting?

15 THE WITNESS: Right. This was something less than
16 that, because I think a lot of this stuff he was talking about
17 and I was trying to write it, but -- so as much as I attempted
18 to get verbatim notes, I didn't always.

19 THE COURT: All right.

20 Did you have any regular practice with respect to
21 note-taking, in other words, in terms of what you might be
22 inclined to write down that you could describe?

23 THE WITNESS: Yes.

24 Well, normally I wrote down things that I felt that I
25 needed more explanation on or that, you know, if they were

F7mnosb4

Peck - redirect

1 saying something that was really important then I wrote it, and
2 if I didn't have a presentation then I wrote it down myself,
3 which is why we have that silly diagram here at the end.

4 THE COURT: Is now a good time to take a break for
5 lunch or do you want to go through?

6 MR. RUMELD: I want to just ask one more question.

7 THE COURT: Sure. Absolutely. Go ahead.

8 BY MR. RUMELD:

9 Q. Did you have an understanding of Mr. Kiley's practices with
10 respect to taking notes?

11 A. He took notes about everything.

12 Q. And you found his notes to be very complete?

13 A. Yes.

14 MR. RUMELD: OK. Thank you, your Honor.

15 THE COURT: All right. Thank you.

16 Let's take our break for lunch and come back at 2
17 o'clock.

18 Is there anything anybody wants to raise before we
19 break for lunch? No. All right. Thank you.

20 (Luncheon recess)

F7MJOSB5

Peck - redirect

1 AFTERNOON SESSION

2 2:00 pm

3 (Trial resumes)

4 (In open court)

5 THE COURT: All right, ladies and gentlemen, let's all
6 be seated. Mr. Rumeld, you may proceed, sir.

7 MR. RUMELD: Thank you, your Honor. May I approach?

8 THE COURT: You may.

9 PATRICIA A. PECK, resumes

10 REDIRECT EXAMINATION (Continued)

11 BY MR. RUMELD:

12 Q. Ms. Peck, I am going to show you what has been marked as
13 Defendant's Exhibit 161 and it is also Plaintiff's Exhibit 113.
14 You probably have it there but it is easier if I just hand you
15 the exhibit.

16 A. Okay. Thank you.

17 Q. Ms. Peck, would you just review those materials and give me
18 your understanding of what the subject matter of the discussion
19 is.

20 A. Okay. It starts with a note from Roger Farah to John
21 Gillespie and John Cannon, expressing his concern about a 6
22 percent interest that we're guaranteeing on account balances in
23 the pension program. He is asking for an analysis of how this
24 impacts the program.

25 The next letter is from William Mercer, James Cassidy

F7MJOSB5

Peck - redirect

1 in particular, to Nancy Herman, explaining what would happen if
2 the reduction of the interest credit was changed from 6
3 percent, what would happen if the annual pay credits are
4 reduced, what would happen if we freeze the plan, and what
5 would happen if we terminate the plan.

6 Q. Now, I think you can stop there.

7 A. Okay.

8 Q. What do you understand to be Mr. Farah's objectives?

9 A. I think it in that time period, the 6 percent, he was
10 concerned about 6 percent being high.

11 Q. What did he think it was doing to the costs?

12 MR. GOTTESDIENER: Objection.

13 THE COURT: Sustained.

14 BY MR. RUMELD:

15 Q. Why was Mr. Farah concerned about the 6 percent interest
16 rate?

17 MR. GOTTESDIENER: Objection.

18 THE COURT: That is sustained. You can't ask it that
19 way.

20 BY MR. RUMELD:

21 Q. What was your understanding why Mr. Farah was concerned
22 about the 6 percent interest rate?

23 MR. GOTTESDIENER: Objection.

24 THE COURT: I will allow it. You may answer.

25 A. Okay. I think his concern was that it was too high, 6

F7MJOSB5

Peck - redirect

1 percent, and so could we look at some other alternatives.

2 BY MR. RUMELD:

3 Q. What were the objectives of the various alternatives that
4 were being considered?

5 MR. GOTTESDIENER: Objection.

6 THE COURT: Overruled. You may answer.

7 A. Okay. Would you ask it again, please.

8 BY MR. RUMELD:

9 Q. What did you understand the objectives to be of these
10 various alternatives that were being considered by Mercer?

11 A. The objective was from the get-go to save money and to, you
12 know, give the associates a plan that they could live on
13 between the lump sum cash-outs and the 401 (k).

14 Q. Now, as the note on the top indicates, this letter from
15 Mercer was forwarded to you. What was your role in this
16 discussion?

17 A. I was not -- I didn't have any role in the discussion with
18 James Cassidy and Nancy, only in trying to set up a meeting
19 afterwards, as Roger and John Gillespie requested.

20 Q. Did you have a role in addressing this substance of Mr.
21 Farah's request?

22 A. No, I did not.

23 Q. Would you look with me -- I am looking at the Mercer
24 letter, the September 11th letter. Do you have that in front
25 of you?

F7MJOSB5

Peck - redirect

1 A. I do.

2 Q. I am just going to read a couple of sentences from the
3 second paragraph there.

4 "As way of background, the only area in which
5 significant cash savings can be realized is in the future
6 accrual of benefits (i.e., the normal cost) under the current
7 plan provisions, the normal cost is about \$4 million for 1996
8 and is expected to rise to about \$10 million by the Year 2000.
9 The increase is due to short term savings built into the plan
10 design which wear away over the next three to four years."

11 Do you see that?

12 A. Yes.

13 Q. So, first of all, do you think you read this at the time?

14 A. Who, Roger?

15 Q. Did you read this letter at the time?

16 A. Oh, I am sorry. Yes, when Nancy sent it to me, but I had
17 already gotten it from John Cassidy.

18 Q. Were you focused on the substance of this letter?

19 A. Yes, I was because I thought this was telling that he
20 expected we would be able to, you know, increase the normal
21 costs, which to me meant wear-away was going to go away.

22 Q. Would you explain what you mean by that.

23 A. Well, the current, the normal cost currently was 4 million,
24 but he was saying that in four years he thought it would go up
25 to 10 million.

F7MJOSB5

Peck - redirect

1 Q. Right.

2 A. So he thought that was because of the savings that were
3 built into the design.

4 Q. Do you know whether at the time you connected those two
5 sentences to the wear-away effect that you had been discussing
6 when you first talked about the cash balance plan?

7 MR. GOTTESDIENER: Objection.

8 THE COURT: I'll allow it. Overruled.

9 A. I don't think I did.

10 BY MR. RUMELD:

11 Q. How were you thinking? What did you understand when you
12 were thinking about the wear-away effect?

13 MR. GOTTESDIENER: Objection.

14 THE COURT: I'll allow it.

15 A. What did I understand?

16 BY MR. RUMELD:

17 Q. Right. You went to that meeting back in February?

18 A. Right.

19 Q. And you gained some understanding of wear-away?

20 A. Yes.

21 Q. So when you were thinking of wear-away --

22 A. Ah-huh.

23 Q. The way we have been using it in this case, what did you
24 connect it to? What did you think about it?

25 MR. GOTTESDIENER: Objection.

F7MJOSB5

Peck - redirect

1 THE COURT: What is her definition or what is her
2 view?

3 BY MR. RUMELD:

4 Q. What was your understanding about what wear-away meant?

5 THE COURT: The definitional question, okay.

6 A. Okay. It meant that people would not be getting the
7 credits that they -- the materials that they would get, and it
8 also meant that it would take them a couple of years before
9 they got into the space where they would again start earning
10 credits.

11 Q. So you looked at it from the perspective of the
12 participant's benefits?

13 A. Yes.

14 MR. GOTTESDIENER: Objection.

15 THE COURT: Overruled.

16 BY MR. RUMELD:

17 Q. Did you ever connect that understanding of wear-away to
18 cost savings issues?

19 A. No, not really, other than seeing something like this, but
20 no.

21 Q. Now, do you know what became of Mr. Farah's request to
22 reconsider the 6 percent interest rate?

23 A. No, I don't.

24 Q. Do you know if the 6 percent rate was ever changed?

25 A. To the best of my knowledge, it was not.

F7MJOSB5

Peck - redirect

1 Q. Do you recall there being any other changes to the cash
2 balance formula that reduced costs?

3 A. No.

4 Q. Now, you gave some testimony this morning and yesterday
5 about the company-wide communications.

6 A. Yes.

7 Q. In reviewing those communications, did you feel any
8 responsibility towards the plan participants?

9 A. Responsibility for the plan participants?

10 Q. Yes. Did you feel you owed them any responsibility in
11 connection with those communications?

12 A. No, I did not.

13 Q. Only to the company?

14 A. Only to the company.

15 Q. Did you feel any responsibility as to whether the
16 communications needed to be accurate in some way?

17 A. Yes, I thought they had to be accurate.

18 Q. Why did you feel that way?

19 A. That's the way the department operated that, you know,
20 anything that we got out should be accurate.

21 Q. You also said that your department was concerned about
22 employee morale?

23 A. Yes.

24 Q. Would you say your department was concerned about the
25 general welfare of the employees?

F7MJOSB5

Peck - redirect

1 A. Yes.

2 MR. GOTTESDIENER: Objection.

3 THE COURT: Overruled.

4 THE WITNESS: Sorry.

5 BY MR. RUMELD:

6 Q. Did your concerns about the employees influence in any way
7 what you thought you were doing when you were reviewing these
8 communications?

9 MR. GOTTESDIENER: Objection.

10 THE COURT: Overruled.

11 A. Can you ask that again, please.

12 BY MR. RUMELD:

13 Q. Well, did the fact that you were concerned for the general
14 welfare of your employees --

15 A. Right.

16 Q. -- influence the approach you took when you were reviewing
17 these communications?

18 A. No, it did not.

19 Q. You didn't have any concern for the employees'
20 understandings of these communications?

21 MR. GOTTESDIENER: Objection.

22 THE COURT: Overruled.

23 A. I felt that that was being taken care of by the other
24 members of my department who were going to different sites and
25 meeting with the employees and having meetings to explain it.

F7MJOSB5

Peck - redirect

1 BY MR. RUMELD:

2 Q. Now, you described that announcement letter from the
3 president, the newsletter?

4 A. Yes.

5 Q. At the time did you think what the letter was describing
6 was good news?

7 A. Yes.

8 Q. Why is that?

9 A. Because the pension plan was going to have a cash balance
10 feature -- excuse me -- the lump sum feature which the current
11 plan did not have and also because we were introducing a 401
12 (k).

13 Q. Did you feel that there was anything misleading about the
14 letter characterizing the changes as good news?

15 A. I did not, no.

16 Q. At the time you were aware these changes were going to save
17 the company costs?

18 A. Yes.

19 Q. Is that right?

20 A. Yes.

21 Q. Did you view that as bad news for the participants?

22 A. No.

23 Q. Now, who do you think drafted this letter?

24 A. Which one?

25 Q. Let me ask it this way. Do you think you drafted the

F7MJOSB5

Peck - redirect

1 initial announcement letter?

2 A. The good news-bad news?

3 Q. Right. I think you described it as the good news.

4 A. Right. I understand. I probably did it first and then
5 gave it to Barry.

6 THE COURT: PX-9?

7 MR. GOTTESDIENER: 2.

8 THE COURT: 2? Sorry.

9 BY MR. RUMELD:

10 Q. Would you look at Paragraph 17 of your declaration.

11 A. Yes.

12 Q. So it says there even with, "Even with respect to these
13 communications, my role was limited, in that each was initially
14 drafted, in collaboration with the staff at Mercer, by someone
15 else in the corporate benefits department, someone on Foot
16 Locker's internal legal staff, or W. Barry Thomson, Foot
17 Locker's chief administrative officer at the time."

18 Do you see that?

19 A. Yes.

20 Q. You did review this declaration carefully before you signed
21 it?

22 A. Pardon me?

23 Q. You reviewed this declaration carefully before you signed
24 it?

25 A. I did.

F7MJOSB5

Peck - redirect

1 Q. Is that statement still accurate?

2 A. Yes.

3 Q. Do you understand that statement to mean you drafted the
4 announcement letter or somebody else did?

5 A. No. I think, you know, I may have given them an outline of
6 what I thought should be in it, but I didn't draft the letter.

7 I think it was done by Mercer and the benefits
8 department together and then eventually get moving until it was
9 ready to go.

10 MR. RUMELD: May I approach, your Honor?

11 THE COURT: You may.

12 BY MR. RUMELD:

13 Q. I am going to show you what has previously been marked as
14 Defendant's Exhibit 16.

15 A. Thank you.

16 Q. Do you recognize the notations on this document?

17 A. Yes, I do.

18 Q. Whose are they?

19 A. Mine.

20 Q. So you're marking up the draft. Is that right?

21 A. Yes.

22 Q. Do you see in the third paragraph there were some lines
23 over the sentence the Woolworth retirement plan and the Kenney
24 manufacturing plan will be converted into the cash balance plan
25 and benefits accrued under these plans will become the opening

F7MJOSB5

Peck - redirect

1 balance of the cash balance accounts for participants in those
2 former plans. Do you see that?

3 A. Yes.

4 Q. I want to first understand, were you meaning to cross that
5 sentence out?

6 A. Yes.

7 Q. Do you know why you crossed that sentence out?

8 A. No, I don't know why I did it at the time.

9 Q. If you look on a couple of sentences down, there is a
10 sentence that says participants will be able to see your
11 individual account balance grow each year and know its value.

12 Do you see that?

13 A. Yes, I do.

14 Q. Now, at the time you reviewed this, what did you think the
15 word, "value" meant?

16 A. Is there something else?

17 Q. Well, how did you understand that sentence at the time, if
18 you remember?

19 A. Increase, increase. I think it was synonymous with
20 increase.

21 Q. You reviewed this sentence -- did you prepare this
22 sentence?

23 A. No.

24 Q. Someone else did because it is already here?

25 A. Right.

F7MJOSB5

Peck - redirect

1 Q. Do you think that when you reviewed this sentence, you
2 thought it was false?

3 A. I thought it was what?

4 Q. Do you think that when you reviewed this sentence, you
5 thought it was false at the time?

6 A. Oh, okay. No, I didn't think it was false.

7 Q. Would it be your practice to raise a question or change a
8 sentence that you thought at the time was false?

9 A. To raise a question if I thought it was false, yeah.

10 Q. Now, in your declaration you testified that you received
11 input from various people about the content of this letter?

12 A. Yes.

13 Q. I just read this a minute ago, but the people who
14 contributed to the letter included Mr. Thomson, Mr. Bahler, the
15 general counsel, and outside counsel. Is that right?

16 A. Right.

17 Q. Mr. Bahler is the general counsel, isn't he?

18 A. Yes.

19 Q. And what was your understanding as to what they were doing
20 when they were reviewing this letter?

21 A. Well, they would come back with comments that they had.

22 Q. Was it your expectation that they would similarly raise
23 questions about any sentences in the letter that they thought
24 were false?

25 A. Yes.

F7MJOSB5

Peck - redirect

1 Q. I think you have Defendant's Exhibit 19 attached to your
2 declaration. That would be PX 167.

3 MR. RUMELD: Mr. Clark doesn't think you have it, your
4 Honor. You should have it attached. (Pause) I'll give the
5 witness another copy because I can get it easier for her.

6 (Off-the-record discussion)

7 BY MR. RUMELD:

8 Q. Now, you testified earlier that Mr. Bahler and outside
9 counsel were often in the loop on these types of
10 communications?

11 A. Yes.

12 Q. And from looking at the fax cover sheet, you see that this
13 was sent by Mr. Bahler to Andrea Rattner to review?

14 MR. GOTTESDIENER: Objection, your Honor.

15 THE COURT: Hold on a second. Overruled. You may
16 answer.

17 A. Yes, I see that.

18 THE COURT: You need to lay a foundation with this
19 witness for this document, don't you?

20 BY MR. RUMELD:

21 Q. What was your understanding of the process pursuant to
22 which outside counsel was consulted on plan communications?

23 MR. GOTTESDIENER: Objection.

24 THE COURT: Overruled.

25 A. I know any time there was something going out to all

F7MJOSB5

Peck - redirect

1 associates that committed the company to something, that our
2 internal legal department would discuss it with outside
3 counsel.

4 BY MR. RUMELD:

5 Q. So the communication with outside counsel was conducted by
6 the company's lawyers, not by you directly?

7 A. Correct.

8 Q. Did you ever speak to outside counsel directly about
9 communications like these?

10 A. Ever? Probably I did in 37 years, yes.

11 Q. I apologize. That question was too open-ended.

12 Was the general process to have Mr. Bahler or somebody
13 on his team speak to outside counsel?

14 A. Yes.

15 Q. So you don't see anything unusual here that Mr. Bahler
16 would be communicating with Ms. Rattner about this?

17 A. Oh, no, no.

18 Q. You do know who Ms. Rattner is?

19 A. Pardon me?

20 Q. You you do know who Ms. Rattner is?

21 A. Oh, sure.

22 Q. You say oh, sure?

23 A. Yes, yes.

24 Q. Why are you so familiar with her?

25 MR. GOTTESDIENER: Objection.

F7MJOSB5

Peck - redirect

1 THE COURT: Overruled.

2 A. Because we've worked with her now for years, so I know who
3 she is. As I said earlier, I believe that she is a partner, if
4 that is the title, in the law firm.

5 BY MR. RUMELD:

6 Q. She was the one who attended that meeting back in February?

7 A. Yes.

8 Q. So she was at the meeting that you were at when you got
9 your first explanation of wear-away?

10 A. Yes.

11 MR. GOTTESDIENER: Just for the record, if he is
12 holding onto this document, I submit there was never any
13 foundation laid for that testimony. We object.

14 THE COURT: The application is denied.

15 BY MR. RUMELD:

16 Q. Could you look for Defendant's Exhibit 27 attached to your
17 declaration.

18 A. Yes.

19 MR. RUMELD: Your Honor, I have another copy for you.

20 THE COURT: I know I have this one.

21 MR. HUANG: PX-29, your Honor.

22 THE COURT: 29? Thank you.

23 BY MR. RUMELD:

24 Q. Do you have it in front of you, Ms. Peck?

25 A. Yes, I do.

F7MJOSB5

Peck - redirect

1 Q. Now, you see here's a fax cover sheet from Mr. Kiley to Mr.
2 Grefig. Do you see that?

3 A. Yes, I do.

4 Q. Mr. Kiley is soliciting Mr. Grefig's comments on this
5 November memo?

6 MR. GOTTESDIENER: Objection.

7 A. Yes.

8 THE COURT: To the extent she is simply reading off
9 the document, I will allow it. Why don't you either lay a
10 foundation for this witness for this particular document or
11 talk about general practices or something else.

12 MR. RUMELD: Right. Okay. Thank you, your Honor.

13 BY MR. RUMELD:

14 Q. You did testify in your declaration that your understanding
15 was that Mr. Grefig or someone from Mercer was also asked to
16 review the plan communications?

17 A. Yes.

18 Q. And this was true notwithstanding the fact that Foot
19 Locker did not hire Mercer's communications services?

20 A. That's correct.

21 Q. Do you think there was anybody who was more knowledgeable
22 than Mr. Grefig about the expected period of wear-away at this
23 time period?

24 A. I wouldn't know.

25 Q. He was certainly more knowledgeable than you would be?

F7MJOSB5

Peck - redirect

1 MR. GOTTESDIENER: Objection.

2 A. Yes.

3 THE COURT: Overruled. In terms of your
4 understanding?

5 THE WITNESS: Yes, he is an actuary.

6 BY MR. RUMELD:

7 Q. What was the purpose of sending these communications to Mr.
8 Grefig?

9 MR. GOTTESDIENER: Objection.

10 THE COURT: Why don't we talk about it apart from this
11 document which is DX-27 or PX-19, whatever it is -- 29, and
12 just talk generally.

13 BY MR. RUMELD:

14 Q. Why was Mr. Grefig sending plan communications to you?

15 A. Because he has been part of this, you know, adviser to the
16 task force all along, so Tom was just saying this is what we
17 are planning on sending out, would you take a look at it and
18 tell me if you have any comments.

19 Q. If Mr. Grefig found any sentences in the communication that
20 he thought to be false, would you expect him to raise that with
21 you or with Tom?

22 MR. GOTTESDIENER: Objection.

23 A. Yes.

24 THE COURT: Overruled. Has there ever been any
25 instances when you received comments back from Mr. Grefig

F7MJOSB5

Peck - redirect

1 directly relating to employee communications, whether in
2 connection with the efforts for the amended plan or something
3 else?

4 THE WITNESS: I didn't receive them personally, but I
5 would think that Tom did.

6 THE COURT: All right. Do you know whether or not Mr.
7 Grefig had a practice, putting aside your expectation, but had
8 a practice of raising with Mr. Kiley matters which he viewed as
9 wrong? Or is it just your reasonable expectation that he
10 would?

11 THE WITNESS: That is definitely my reasonable
12 expectation.

13 THE COURT: You don't really know what Mr. Grefig's
14 practices were with respect to conveying comments and what he
15 would convey and wouldn't convey?

16 THE WITNESS: Right. Yes, that's correct.

17 THE COURT: Thank you.

18 BY MR. RUMELD:

19 Q. Could you just turn to the last two pages of that exhibit.

20 Do you see there are handwritten notations there. Do
21 you have that on your copy? Do you see on 2266 and 2267, do
22 you see that?

23 A. Yes, I see it.

24 Q. Do you know whose notations those are?

25 A. Tom's.

F7MJOSB5

Peck - redirect

1 Q. Do you know, are you able to tell whether these are his
2 corrections or corrections that he took down for Mr. Grefig?

3 A. No, I wouldn't know.

4 Q. Do you know whether Tom had a practice of soliciting
5 comments on the telephone and taking them down?

6 A. From whom?

7 Q. Did Tom have a practice of soliciting comments on the
8 telephone and then writing those comments down?

9 A. Oh --

10 THE COURT: Again don't speculate. If you can recall
11 even generally, then we'll take your best recollection. I
12 don't want you speculating.

13 THE WITNESS: Right. I don't know if he would. I
14 mean I don't know that it would be regular. It would have to
15 be an exceptional circumstance for John to call rather than --

16 MR. HUANG: If I may clarify, DX 27 has two PX
17 numbers. It is PX-29, and the part on the screen right now is
18 PX-614.

19 THE COURT: 614? Thank you.

20 MR. RUMELD: That memo appears twice in ours.

21 BY MR. RUMELD:

22 Q. Now, Ms. Peck, you were also shown a copy of the estimated
23 pension statement that went out shortly after the cash balance
24 conversion. Do you remember that?

25 A. Yes.

F7MJOSB5

Peck - redirect

1 Q. Who worked on that statement?

2 A. Tom and Carol, to my knowledge, with Jim.

3 Q. Do you know if Marion worked on the statement?

4 A. I don't know that for sure.

5 Q. When these employees worked on benefit statements, did they
6 report back to you if they had any comments or changes?

7 A. Yes.

8 Q. Would you expect them to point out to you anything in the
9 statement that they found to be false?

10 A. Yes.

11 Q. Do you remember them ever calling to your attention
12 anything in the statements that they found to be false?

13 A. No.

14 Q. You do remember that when Mr. Gottesdiener was questioning
15 you, you testified that one of his sentences in the statement
16 was false with respect to anyone in the Southern Railway?

17 A. Yes, all right.

18 Q. Do you remember thinking about that sentence back in the
19 1990's, that it was false?

20 A. I don't remember that then, no.

21 Q. So when you say you knew it was false, what did you mean by
22 that?

23 MR. GOTTESDIENER: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: Can we go back and look at the sentence?

F7MJOSB5

Peck - redirect

1 MR. RUMELD: Sure. So I am going to show you
2 Defendant's Exhibit 310.

3 THE WITNESS: Thank you.

4 MR. HUANG: PX-43.

5 BY MR. RUMELD:

6 Q. If you look at the right side of the statement, okay,
7 towards the top, it first says your estimated account balance
8 as of January 1st, 1998. Do you see that?

9 A. As of '96.

10 Q. I am sorry, 1996. Right. My eyesight is failing.

11 Underneath there it says, "The amount shown above is
12 what you could expect to receive upon termination of employment
13 or retirement if you accrue no further benefits and elect a
14 lump sum form of payment."

15 Do you see that?

16 A. I see that.

17 Q. Would you agree that -- you testified, you testified
18 earlier you found that statement to be false --

19 MR. GOTTESDIENER: Objection.

20 Q. -- with respect to anyone who was in --

21 MR. GOTTESDIENER: Objection.

22 THE COURT: I will allow it. The answer was
23 previously given. What it is is in the record. In order to
24 make the connection, I will allow counsel to pose the question
25 in the manner that he has. You may answer.

F7MJOSB5

Peck - redirect

1 A. Okay. I am just reading it again. I don't know that it
2 was false, actually, as I reread it now because unless someone
3 was not in wear-away, most likely it wasn't going to change.

4 BY MR. RUMELD:

5 Q. Do you have any memory of thinking about this sentence in
6 1995 or 1996 and thinking that the sentence was false?

7 A. I do not recall that, no.

8 Q. Since the time this lawsuit started, you spent a lot of
9 time thinking about these issues. Is that right?

10 A. I have.

11 Q. Do you feel you have the ability to separate what you're
12 thinking about now about these sentences from what you were
13 thinking about 20 years ago?

14 A. They sort of run together sometimes. I try to separate
15 them, but it is hard.

16 Q. Now, back in 1995 and 1996, there were a lot of employees
17 leaving the company. Is that right?

18 A. That's correct.

19 Q. Anyone leaving, a person leaving the company in 1996 was
20 likely to have experienced wear-away. Is that right?

21 A. Yes.

22 Q. Did you think an employee whose employment terminated in
23 1996 was better or worse off as a result of the plan
24 amendments?

25 MR. GOTTESDIENER: Objection.

F7MJOSB5

Peck - redirect

1 THE COURT: Overruled.

2 A. Better.

3 BY MR. RUMELD:

4 Q. Why was that?

5 A. Because they were going to get the value of the, the
6 accrued value from 12-31-95 as a lump sum.

7 Q. Did you feel that way notwithstanding the fact that those
8 employees would have no new accruals under the new plan?

9 A. They were leaving the company, so yes.

10 Q. Now, an employee reading a statement like the one in front
11 of you --

12 A. Ah-huh.

13 Q. -- if he or she did not understand wear-away, what
14 information would he be lacking?

15 MR. GOTTESDIENER: Objection.

16 THE COURT: Sustained. Ask a different question.

17 BY MR. RUMELD:

18 Q. Well, in your mind, Ms. Peck --

19 A. Yes.

20 Q. -- you've testified that you didn't expect that
21 participants would readily understand wear-away?

22 MR. GOTTESDIENER: Objection.

23 THE COURT: Again the testimony answered previously
24 given will stand in the record as it stands. To make the
25 connection, I will allow counsel to ask the question this way.

F7MJOSB5

Peck - redirect

1 You may answer.

2 A. Okay, yes.

3 BY MR. RUMELD:

4 Q. You understood it to be a difficult concept?

5 A. Yes.

6 Q. And participants were not readily going to understand it?

7 A. Right.

8 MR. GOTTESDIENER: Objection.

9 THE COURT: Overruled.

10 BY MR. RUMELD:

11 Q. In your mind, if a participant received the benefit
12 statement that said this is the amount you could expect to
13 receive when you leave --

14 A. Ah-huh.

15 Q. -- and the participant was not aware about the minimum lump
16 sum --

17 A. Right.

18 Q. -- in your mind, what was the consequence of the
19 participant not being aware of the minimum lump sum?

20 A. There was no consequence. It was a good thing because they
21 got more money than they expected they would get and they got
22 it immediately.

23 Q. So back in 1995 and 1996, did you believe that there was
24 any harm being inflicted on participants if they did not
25 understand about the minimum lump sum?

F7MJOSB5

Peck - redirect

1 MR. GOTTESDIENER: Objection.

2 THE COURT: Overruled.

3 A. No, because they got more money than they expected they
4 were going to get.

5 BY MR. RUMELD:

6 Q. You testified this morning that the summary plan
7 description was irrelevant for any employees who were still in
8 wear-away. Do you remember that testimony?

9 A. Yes.

10 Q. Did the SPD inform participants about their lump sum
11 option?

12 A. Yes, I believe it does.

13 Q. If a participant only had the prior SPD from the old plan,
14 would he or she be aware of the lump sum option?

15 A. No.

16 Q. Because there was no lump sum option --

17 A. There was no lump sum option.

18 Q. -- in the old SPD?

19 A. Right.

20 Q. A participant in wear-away would get his benefit based on
21 the pre-'96 accrual, but he could get it in the form of a lump
22 sum. Is that correct?

23 A. Right.

24 MR. GOTTESDIENER: Objection.

25 THE COURT: Overruled.

F7MJOSB5

Peck - redirect

1 BY MR. RUMELD:

2 Q. Would you agree with me that the SPD was relevant at least
3 for the purposes of explaining the lump sum option?

4 MR. GOTTESDIENER: Objection.

5 THE COURT: Overruled.

6 A. Yes.

7 BY MR. RUMELD:

8 Q. Who was principally responsible for preparing the summary
9 plan description?

10 A. Tom and Carol, with Jim.

11 Q. Do you know if the general counsel or outside counsel had a
12 role with respect to the summary plan description?

13 A. Oh, yes, of course they would have it.

14 It would have come to me, and then we would also send
15 it to Gary and Rina would have looked at it and the tax,
16 Jeremy, the tax guy, would have looked at it. Anybody who had
17 any professional knowledge that was addressed in there would be
18 included, in our view.

19 Q. Why do you say, "of course"?

20 A. Sorry. Take it out.

21 Q. Why are you so certain that counsel needs to be involved
22 when it comes to the summary plan description?

23 A. Because we thought of it as a legal document, and so we
24 would have been very careful about what we put in it and made
25 sure that we covered everything that we were supposed to.

F7MJOSB5

Peck - redirect

1 Q. Would you say you also made sure that the summary plan
2 description did not contain any statements that you believed to
3 be false at the time?

4 A. Yes.

5 MR. RUMELD: May I just have a moment, your Honor?

6 THE COURT: Yes.

7 (Off-the-record discussion)

8 BY MR. RUMELD:

9 Q. You testified earlier about the responsibilities of th
10 ehuman resources people in Wisconsin?

11 A. Yes.

12 Q. Did there come a time when there was a change in the
13 delegation of the administrative responsibilities?

14 THE COURT: You mean for pension plan communications
15 to participants?

16 MR. RUMELD: I was trying to keep it open-ended.

17 THE COURT: It may be so open-ended that it is a
18 little tough.

19 BY MR. RUMELD:

20 Q. Do you remember whether there was a time when some of these
21 responsibilities were outsourced?

22 A. Outsourced the actual writing of the document or printing?

23 Q. What about calculating the benefits?

24 A. They were doing it in the office.

25 Q. Did there come a point in time when Mercer took over those

F7MJOSB5

Peck - redirect

1 responsibilities?

2 A. Actually, Mercer still does the calculations today.

3 Q. Were those responsibilities taken over from people in
4 Wisconsin?

5 A. Yes.

6 Q. Do you know when that occurred?

7 A. No, not offhand.

8 Q. Do you know whether it occurred a long time ago?

9 A. Yeah, it has been a while, but I don't know exactly when we
10 signed the contract with Mercer, I don't.

11 Q. Do you know specifically what responsibilities Mercer took
12 over?

13 A. Well, right now if someone wants to retire, they call
14 Mercer's call center, and Mercer sent out the retirement papers
15 with all that's required, and then they estimate the benefits.
16 Then the employee fills everything out in order to commence
17 their retirement.

18 Q. If an employee calls up for an estimate, does he get that
19 information from Mercer now?

20 A. Yes.

21 Q. You said that Mercer handles a call center?

22 A. Yes.

23 Q. Is that in place of the call center that used to be handled
24 out of Wisconsin?

25 A. That call center is still there, but now they do other

F7MJOSB5

Peck - redirect

1 things so, yes, it did replace what was being done in
2 Milwaukee.

3 Q. It replaced what was being done in Milwaukee for pension
4 issues?

5 A. Correct.

6 Q. I apologize for asking this, Ms. Peck, but could you just
7 tell the court about your health circumstances.

8 A. My health?

9 Q. Yes.

10 A. In November of 2013, I was diagnosed with lung cancer.
11 Since that time I've had 53 radiation treatments to my brain,
12 my femur, adrenal gland and the lung. I get chemo once every
13 three weeks.

14 Q. Do you feel that those experiences have had an impact on
15 your ability to remember things?

16 A. Yes, they definitely have. There is a big article in the
17 Wall Street Journal a couple of weeks ago about what the
18 radiation does to your brain because that's where most of the
19 radiation treatments were to my brain, whole brain and it is
20 called whole brain radiation. That is the downside of whole
21 brain radiation, is that it affects your cognitive abilities.

22 MR. RUMELD: Nothing further. Thank you.

23 THE COURT: You're done, Ms. Peck. You may step down.
24 You're excused.

25 (Witness excused)

F7MJOSB5

Peck - redirect

1 THE COURT: Mr. Gottesdiener, would you like to call
2 your next witness.

3 MR. GOTTESDIENER: Yes, your Honor.

4 MICHAEL T. STEVEN,

5 called as a witness by the Plaintiff,

6 having been duly sworn, testified as follows:

7 THE COURT: Mr. Steven, please be seated as you are.

8 You might want to adjust your chair and pull it up
9 right there to the microphone and it will be very important
10 that you speak clearly into the microphone. Thank you. All
11 right. Mr. Gottesdiener, you may proceed, sir. Do you have
12 his declaration?

13 MR. GOTTESDIENER: Yes, your Honor.

14 THE COURT: Mr. Steven, we are going to start by
15 having you look at that declaration that has been placed before
16 you and confirm that that is, in fact, your declaration that
17 you intend as your direct trial testimony in this matter?

18 THE WITNESS: I do.

19 THE COURT: Do you swear to the truth of the contents
20 of that declaration?

21 THE WITNESS: Yes.

22 THE COURT: The court does accept the witness's
23 declaration as his direct trial testimony, and he is turned
24 over for cross-examination. Mr. Rumeld, it is now your turn.

25 (Continued on next page)

F7mnosb6

Steven - cross

1 CROSS EXAMINATION

2 BY MR. RUMELD:

3 Q. Good afternoon, Mr. Steven.

4 You enjoyed working for Woolworth, am I right?

5 A. Yes, very much.

6 Q. In fact, you testified that your experience with Woolworth
7 was wonderful?

8 A. Exactly.

9 Q. You also state in your declaration that the company was not
10 months away from bankruptcy as we have alleged?

11 A. Yes.

12 Q. And you don't have any recollection, do you, about what the
13 company's stock was doing back in 1995 or 1996, do you?

14 A. It had taken a plunge certainly. I don't have an exact
15 recollection, but it did go down. I think at one point it was
16 up in the 60s, and then down into the teens.

17 Q. You would agree that the Woolworth division was in a loss
18 position, correct?

19 A. Yes.

20 Q. In fact, that division ultimately closed?

21 A. Yes.

22 Q. You also agree that you were part of an initiative to save
23 a significant amount of money for the company?

24 A. My department, which was the financial planning and
25 analysis group, was charged with monitoring the challenge that

F7mnosb6

Steven - cross

1 Roger Farah had given to enact a \$100 million cost savings.

2 Q. You retired from the company in 1997, correct?

3 A. Yes.

4 Q. Your decision to retire was not impacted by your
5 understanding of your retirement benefits, correct?

6 A. My decision to retire, I had planned to do 15 years of
7 service. My wife and I had both. I wanted to retire early,
8 and on May 1 it was 15 years.

9 Q. When you retired you took a lump sum, correct?

10 A. Yes.

11 Q. You took your benefit in the form of a lump sum because you
12 thought you could do better on your own, correct?

13 A. Exactly.

14 Q. In fact, you did very well?

15 A. Yes.

16 Q. Before the plan conversion you would not have been able to
17 take your benefits in the form of a lump sum, correct?

18 A. Yes.

19 Q. So, if you had actually reached your 15 years two years
20 earlier, you would not have had that opportunity to take a lump
21 sum?

22 A. Right. I would have had to have taken an annuity.

23 Q. You understood that after the plan amendment you were going
24 to have a starting account balance, correct?

25 A. Yes.

F7mnosb6

Steven - cross

1 Q. In your declaration you say that you thought your old
2 benefit was being deposited into your cash balance account?

3 A. Yes.

4 Q. You are an MBA and a CPA, correct?

5 A. Yes, retired.

6 Q. So you knew that you can't simply deposit an annuity
7 benefit into a cash balance account, right?

8 A. I have lost your question.

9 Q. You can't just --

10 A. This was an account balance that they had.

11 Q. Right.

12 A. Which was a cash account balance I assume.

13 Q. So you understood that there had to be some conversion
14 process --

15 A. Yes.

16 Q. -- to convert the annuity into cash, as you say?

17 A. Yes.

18 Q. That conversion was an actuarial conversion? You
19 understood that?

20 A. Yes.

21 Q. Shortly after the conversion you were aware that your
22 initial account balance was about \$140,000, right?

23 A. Yes.

24 Q. Could you take a look at Exhibit 329 attached to your
25 declaration.

F7mnosb6

Steven - cross

1 A. I don't see 329 attached.

2 Q. It is hopefully the second from the last.

3 A. I have the declaration, but --

4 Q. You don't have the exhibits?

5 MR. GOTTESDIENER: Yes, he does.

6 THE COURT: Why doesn't somebody show him where they
7 are so he is --

8 THE WITNESS: Maybe it's under this one. Hold on.

9 PX 329. Thank you.

10 BY MR. RUMELD:

11 Q. It's the memo dated January 19, 1996?

12 A. Yes.

13 Q. This is a communication that you received in response to a
14 request for a benefit estimate, is that right?

15 A. Yes. Roger and Dale had put out a notice about the new
16 plan and conversion, and I was interested in finding out what
17 my wealth was worth.

18 Q. Right. You, in fact, made this request even before the
19 effective date of the new plan?

20 A. Yes.

21 Q. You directed that request to Mr. Kiley, Tom Kiley?

22 A. Yes.

23 Q. Because you knew him?

24 A. Yes, I knew him.

25 Q. According to this memo, if we assumed a termination date of

F7mnosb6

Steven - cross

1 June 1, 1996, your estimated lump sum would be about \$217,000,
2 is that right?

3 A. That's what it says.

4 Q. You saw that back at the time when you got this letter?

5 A. Yes.

6 Q. At the time, even though your account balance isn't listed
7 here, you were aware that this estimated lump sum was
8 significantly larger than your initial account balance, is that
9 right?

10 A. Not having seen the account balance, I wasn't totally sure,
11 but I assumed it was.

12 Q. I think you told you also a few minutes ago that you knew
13 your initial account balance was --

14 A. That came out later than this.

15 Q. OK. So when it came out, you saw that --

16 A. Yes, then I saw. But I didn't see it up to this point.

17 Q. OK. And your initial account balance came back early in
18 1996, is that right?

19 A. Yes, sir.

20 Q. Is it fair to say that you were pleasantly surprised at the
21 time to see that your lump sum was much bigger than your
22 account balance?

23 A. Yes.

24 Q. You claim that you didn't understand why it was bigger, why
25 the --

F7mnosb6

Steven - cross

1 A. Well, I think.

2 Q. -- the lump sum was bigger?

3 A. -- what I interpreted it, if you did see that final
4 statement, which is a litany of items, that it was actuarially
5 done, it was done according to legal requirements from the IRS
6 and from long-term bond rates, and it was done by our company
7 in a fiduciary capacity.

8 Q. Let's just stay on this letter first. When you got this
9 letter or this memo, you didn't ask any questions, did you,
10 about why the lump sum was bigger than your account balance?

11 A. No. To the best of my knowledge.

12 Q. Then later in 1996 you made a second request for a benefit
13 estimate?

14 A. Yes.

15 Q. This time you requested an estimate as of May of 1997, is
16 that right?

17 A. Yes.

18 Q. Because that is when you were planning to leave?

19 A. Yes.

20 Q. In response to that, you received plaintiff's Exhibit 330,
21 is that right?

22 A. Say that again.

23 Q. In response to your request -- you again requested this
24 from Mr. Kiley?

25 A. Yes.

F7mnosb6

Steven - cross

1 Q. In response to the second request for an estimate, you
2 received the memo and the attachments that appear in Exhibit
3 330?

4 A. Yes.

5 Q. Now, if you look first at the cover memo, the second
6 paragraph says, Initial cash balances were based upon the 1983
7 group annuity table of mortality and an interest rate of 9
8 percent.

9 Do you see that?

10 A. Yes.

11 Q. You understood what a table of mortality was at the time,
12 right?

13 A. Yes.

14 Q. You thought that it was appropriate to use such a table in
15 calculating the initial account balance?

16 A. From an actuarial point of view, yes.

17 Q. Now, the next sentence says, For --

18 A. Can I make one comment. You say the 9 percent.

19 MR. RUMELD: Move to strike, your Honor.

20 THE COURT: Well, your lawyer will have an opportunity
21 to come back and bring out some additional materials.

22 You may proceed.

23 BY MR. RUMELD:

24 Q. The second sentence says, For 1996, minimum sums are based
25 upon a table of mortality as specified under federal law (GATT)

F7mnosb6

Steven - cross

1 and the interest rate for 30-year treasury bills in effect on
2 January 1, 1996, which was 6.06 percent.

3 Do you see that?

4 A. Yes.

5 Q. You understood at the time what the reference to the
6 30-year treasury rate was, is that right?

7 A. Certainly.

8 Q. The letter also says that this GATT rate will change for
9 terminations in 1997.

10 Do you see that?

11 A. Yes.

12 Q. You understood why that was so?

13 A. Yes.

14 Q. Because the treasury rate moves up and down all the time?

15 A. Yes.

16 Q. The letter says that for that same reason Mr. Kiley would
17 not be giving you an estimate of your minimum lump sum as of
18 May 1, 1997?

19 A. Yes.

20 Q. That is something that you read and understood at the time,
21 correct?

22 A. Yes.

23 Q. But he did provide you with the minimum lump sum as of the
24 end of 1996, am I correct?

25 A. Yes.

F7mnosb6

Steven - cross

1 Q. So if you could turn to the second page.

2 Do you have that in front of you?

3 A. Yes, I do.

4 Q. Under your name and next to your date of birth it says,
5 annual accrued benefit as of 12/31/95.

6 Do you see that?

7 A. Yes.

8 Q. \$32,006.66. Do you see that?

9 A. Yes.

10 Q. You understood that that was the annuity benefit that you
11 were entitled to under the old plan?

12 A. I assumed that, yes.

13 Q. You also understood that that number was fixed?

14 A. That it was actuarially summarized.

15 Q. Under the old plan you were entitled to an annuity benefit,
16 correct?

17 A. Yes.

18 Q. And that was it, right?

19 A. Yes.

20 Q. In the next four lines you start with that \$32,000. It's
21 multiplied a factor, and then you arrive at an initial account
22 balance of \$140,667.67.

23 Do you see that?

24 A. It is discounted by a factor of 9 percent.

25 Q. You understood that the \$140,000 was your initial account

F7mnosb6

Steven - cross

1 balance?

2 A. I understood it from this calculation. I didn't understand
3 that it was a discounted because they didn't use the term
4 discounted.

5 Q. You understood that it was derived from your pre-'96
6 benefit?

7 A. Yes.

8 Q. You also understood that the interest rate that was used to
9 discount it, using your word, was 9 percent because it says
10 that right there, right?

11 A. It doesn't say discounted.

12 Q. Right. But it did say 9 percent?

13 A. Which is an interest factor.

14 Q. Excuse me?

15 A. It is an interest factor --

16 Q. Right. It is an interest factor.

17 A. -- where you earn money --

18 Q. It was arrived at --

19 THE COURT: You do have to let him finish.

20 MR. RUMELD: My apologies.

21 THE COURT: Go ahead. It was an interest factor.

22 A. When you say 9 percent, you think of it as growing, not
23 discounting.

24 Q. If we continue, it shows you \$140,000 starting balance --
25 just one second.

F7mnosb6

Steven - cross

1 You proceed from your \$140,000 initial account balance
2 and then interest is added at 6 percent.

3 Do you see that?

4 A. Uh-huh.

5 Q. And then there are compensation credits totaling \$5,127.

6 Do you see that?

7 A. Uh-huh.

8 Q. Is this all consistent with your understanding of how the
9 cash balance formula worked?

10 A. You mean the -- for increased higher salaries you are
11 talking about?

12 Q. You received --

13 A. Yes.

14 Q. -- interest credits and compensation credits.

15 A. Yes. I wasn't too keyed on the compensation credit, but
16 interest credits are very easy to understand.

17 Q. But from reading this you understood that as a result of
18 adding those credits you were up to \$154,234.73 as of the end
19 of 1996?

20 A. Uh-huh.

21 Q. So that is your account balance at the end of 1996, agreed?

22 A. Yes.

23 Q. Then the next section calculates your minimum lump sum as
24 of December 31, 1996, correct?

25 A. Uh-huh.

F7mnosb6

Steven - cross

1 Q. And it takes that same \$32,000 figure from the top, your
2 annual accrued benefit as of 12/31/95.

3 Do you see that?

4 A. Uh-huh.

5 Q. And it applies the 6.06 percent GATT rate that's referred
6 to on the first page of the letter.

7 Do you see that?

8 A. Yes.

9 Q. And that's how they arrive at the \$224,000 minimum lump sum
10 as of 12/31/96?

11 A. Uh-huh.

12 Q. So, in other words, the minimum lump sum was calculated by
13 taking the present value of the pre-'96 annuity, using the
14 30-year treasury rate as the basis for performing that present
15 value calculation. Would you agree?

16 A. Yes.

17 Q. You understood at the time that, depending on interest rate
18 fluctuations, that minimum lump sum, even though it's based on
19 a fixed number, that annuity, it could be higher, it could be
20 lower?

21 A. Yes. I probably actually felt more comfortable with it
22 later on. I'm not sure I paid as much attention back then.

23 Q. You also state in your declaration that you thought that
24 your benefit under the new plan was growing by at least as much
25 as your account balance?

F7mnosb6

Steven - cross

1 Do you remember making that statement?

2 A. Yes.

3 Q. So if you look back and compare Exhibit 329 with 330, 329
4 the lump sum estimate you received was \$217,000, do you see
5 that?

6 A. Was potential, yes.

7 Q. And the minimum lump sum as of 12/31/96?

8 A. \$224,000.

9 Q. Correct.

10 A. So it was a nice increase.

11 Q. \$7,000 bigger?

12 MR. GOTTESDIENER: Objection, your Honor. I am not
13 sure --

14 THE COURT: You will be able to go back over it.

15 MR. GOTTESDIENER: I'm sorry, your Honor. He's
16 showing, at least the visual guy here is showing the second
17 page of that document. That is not --

18 THE COURT: Do you have the whole document in front of
19 you?

20 THE WITNESS: I have this document here.

21 THE COURT: All right.

22 So is that 329 on the front?

23 THE WITNESS: Yes, ma'am -- no, 330.

24 THE COURT: Do you have 329?

25 Why doesn't somebody hand him 329.

F7mnosb6

Steven - cross

1 THE WITNESS: I have 329.

2 THE COURT: You do?

3 THE WITNESS: I do, yes.

4 THE COURT: If he's misinterpreting it or there is
5 another part that you want to lead him to, you will be able to
6 do it on redirect.

7 MR. GOTTESDIENER: That's not it. He's being shown,
8 or he was shown a document that this gentleman never received.
9 It was a highly internal --

10 THE COURT: I thought it was 329. I thought we were
11 dealing with -- hold on. Let's level set. I thought we were
12 dealing with two documents, 330 and 329.

13 Is that what we are dealing with, Mr. Rumeld.

14 MR. GOTTESDIENER: On the second page of 329 that was
15 produced out of Woolworth's files, the gentleman for the
16 defense running that was showing the second page --

17 THE COURT: Take out the second page.

18 Is the second page something that was included?

19 MR. CLARK: It looks like it was.

20 MR. RUMELD: I was referring to the 217,000 on the
21 first page.

22 THE COURT: That's how I understood it as well and the
23 delta between the 217 and the 224.

24 Why don't you go back over that question, Mr. Rumeld,
25 and we'll take it from there. I don't think there is any

F7mnosb6

Steven - cross

1 confusion. If there is, the record will speak for itself.

2 MR. GOTTESDIENER: The issue, was simply, your
3 Honor --

4 THE COURT: I understand. I just want to move on.
5 Go ahead.

6 MR. RUMELD: Hold on one second.

7 I will move on. I don't want the witness to be
8 confused.

9 BY THE COURT:

10 Q. You see, if you go back to 330, the second exhibit --

11 A. Uh-huh.

12 Q. -- you take this forward, you see that your estimated
13 account balance as of May 1, 1997, is arrived at there?

14 A. Yes.

15 Q. And again, it takes the \$154,000, it adds the pay and the
16 interest credits, and you have an estimated account balance as
17 of May 1, 1997 of \$159,000.

18 Do you see that?

19 A. Right.

20 Q. You also see that as of the end of '96 your minimum lump
21 sum is 224,000?

22 A. Yes.

23 Q. So you can see from this page that, at least as of the end
24 of 1996, your minimum lump sum was considerably higher than
25 your account balance even as estimated through the end of May?

F7mnosb6

Steven - redirect

1 A. Right.

2 Q. So would you agree that unless there was a substantial
3 change in the interest rates, your minimum lump sum was going
4 to be higher than your account balance at the end of May?

5 A. I guess I also interpreted what they said in the letter,
6 which was this is what was required by the IRS and also by
7 GATT, so I assumed that this was a legal requirement to do
8 this.

9 Q. My question, sir, is whether you could see from reviewing
10 this letter that your minimum lump sum was going to be higher
11 than your account balance?

12 A. Yes.

13 Q. You understood at the time that as long as your minimum
14 lump sum remained larger than your account balance the credits
15 referred to on this page that were added to your account
16 balance didn't matter, isn't that right?

17 A. Yes.

18 MR. RUMELD: I have nothing further.

19 THE COURT: Thank you.

20 Mr. Gottesdiener, anything from you?

21 REDIRECT EXAMINATION

22 BY MR. GOTTESDIENER:

23 Q. The credits didn't matter. What did you believe your
24 benefit was under the plan?

25 A. My benefits was my years of service, and my salary and also

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Steven - redirect

1 additional compensation for my salary level.

2 Q. And when the plan changed, you explained you read, received
3 the material about the plan. Prior to the change it was an
4 annuity form of benefit, and then after you believed your
5 benefit was an account, is that correct?

6 A. Yes.

7 Q. What I'm not understanding is the contention that you were
8 told by Mr. Kiley that there is a federal requirement and that
9 under some circumstances you might get more than your account,
10 is that right?

11 A. Yes.

12 Q. Did that tell you that your benefit had been frozen?

13 A. No, not at all.

14 Q. Did you have any idea that your benefit had been frozen?

15 A. Absolutely not.

16 Q. You are a CPA, right, or were a CPA?

17 A. Yes.

18 Q. Had you ever done actuarial calculations before?

19 A. No, I hadn't.

20 Q. Did you have an understanding of what an actuarial
21 conversion really was?

22 A. Just that it had to be according to some standards, just
23 like a CPA would have to perform some services.

24 Q. Did you think that there was one way or more than one way
25 of doing an actuarial conversion?

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Steven - redirect

1 A. No.

2 Q. Either one way or more than one way?

3 A. Only one way. I mean, it's one standard.

4 Q. So you thought there was only one way of doing things in an
5 actuarial conversion, is that correct?

6 A. Yes.

7 Q. And you now know differently, is that fair?

8 A. Yes.

9 Q. Would you be here today if you had any suspicion back then
10 that your benefit was frozen? Would you be testifying here
11 today on behalf of the class?

12 A. I'm testifying here because I think there was a way in
13 which they were hiding some important factors about freezing
14 your account balances.

15 Q. You were asked by Mr. Rumeld about a comment that you were
16 pleasantly surprised when you received the payment that was
17 more than your account balance.

18 Do you remember that?

19 A. Yes.

20 Q. Were you pleasantly surprised to learn earlier last year
21 that your benefit had actually been frozen as of 1/1/96 and you
22 earned nothing for the additional year and a half you worked
23 for the company?

24 A. I would have been very surprised, yes.

25 Q. And you were not pleasantly surprised I am assuming?

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Steven - redirect

1 A. Right.

2 Q. And you were asked why didn't you ask any questions. You
3 got all of what you described in your declaration as actuarial
4 information from Mr. Kiley. Why didn't you ask any questions?

5 A. The issue here is, first of all, I must say looking at this
6 document it is almost like a Chinese menu. Take one from group
7 A, one from group B, subtract this, go up to here. It is a
8 very difficult analysis to look at on an overall basis.

9 Secondly, great respect for Tom Kiley and the HR
10 group, integrity, fiduciary responsibility, and according to
11 actuarial computations. So I put my trust in that.

12 Q. So I'm hearing you saying that you thought you understood
13 it, and there was nothing you needed to ask?

14 MR. RUMELD: Objection.

15 THE COURT: Sustained.

16 You don't need to repeat or summarize the testimony.

17 BY MR. GOTTESDIENER:

18 Q. You said in questioning that the 9 percent was never
19 described -- withdrawn. In the memo that covers these
20 calculations, was the 9 percent described as a discount rate?

21 A. No, it was never described as that. And the first time I
22 actually saw the rationale behind it was at the deposition when
23 counsel showed me the document, and I was quite surprised when
24 it said the 9 percent was just an assumed rate.

25 Q. When you as a CPA see 9 percent interest rate, what do you

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Steven - redirect

1 think?

2 A. It's adding to, not subtracting from, unless it's defined.
3 If it's defined as discount, then you understood it very
4 clearly.

5 Q. If it says interest rate, is there any circumstance that
6 you can think of as a CPA where it states interest rate doesn't
7 state discount rate but you're somehow supposed to know that it
8 is used as a discount rate?

9 A. First of all, it would never ever be by itself without DCF
10 or some way of defining that. In any, you know, legal document
11 or any financial document you would describe the 9 percent,
12 what it was.

13 Q. So did you think the 9 percent was a good thing or a bad
14 thing for your benefit?

15 A. It is interesting you say that. The way it's shown you
16 have the 32 and then you have a multiplication of a number,
17 which actually looks like it's adding to but it's really
18 discounting back. So you can look at it that way. For me very
19 clearly you could see it that way.

20 Q. You were one of a handful of people who were executives who
21 were in the excess plan?

22 A. Yes.

23 Q. Did you have occasion to be in meetings with Tom Kiley on
24 topics other than these estimates?

25 A. When my department put together the budgets, the long-range

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Steven - redirect

1 plans, capital expenditures, we monitored performance, so I am
2 sure in the case of the budget we would have to interact and
3 get assumptions on salaries and stuff. And, of course, we were
4 very, in close proximity at the office, so we would pass and
5 chat.

6 Q. And he was lower down in the hierarchy I would imagine than
7 you were?

8 A. Yes.

9 Q. But you have a clear memory of him?

10 A. Oh, absolutely, yeah, sure. I knew all the top-level
11 people at the corporate level.

12 Q. Did you know anything about wear-away?

13 Had you ever heard of wear-away before you got
14 contacted about this case?

15 A. No, I had never heard of wear-away. I did research it
16 afterwards on the Internet and got some legal opinions about
17 it, and it kind of opened my eyes.

18 Q. So, despite being CFO of the Woolworth division, having a
19 CPA, up until you learned about the pendency of this class
20 action, wear-away was a completely new concept to you?

21 A. Yes.

22 Q. There's been assertions in the case, some testimony and
23 some assertions, as I know you have heard, that the company,
24 the corporation as a whole, not just the F.W. Woolworth
25 division, was on death's door, just a few months away from

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Steven - redirect

1 bankruptcy.

2 Do you have anything that you would like to say in
3 response to that based on your factual knowledge being there at
4 the time?

5 A. Yes, I will --

6 MR. RUMELD: Object, your Honor. If he wants to
7 respond to my cross, that's one thing, but if he's responding
8 to other testimony in the case I think it's beyond the scope.

9 THE COURT: No. I think that you raised in one of
10 your first questions on cross the statement in his declaration
11 relating to the financial health of the company. So to that
12 extent I will allow this question. You may answer.

13 A. In my role with all the management requirements and, you
14 know, literally we were on top of all the management
15 information systems, interacted with the board of directors,
16 interacted with the executive committee. We had created at
17 Woolworth a very sophisticated financial system, and that
18 system monitored down to the lowest profit center. So we could
19 easily determine the contributors and noncontributors.

20 Our internal investment criteria was a total return on
21 investment using cost of capital for equity and the normal
22 interest rates, after tax.

23 So when I would state a return number, it was like you
24 were getting 6 percent, and after 50 percent you only got 3
25 percent. The 17 was the full return.

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Steven - redirect

1 We prepared in '92 I would say a bunch of analyses for
2 the executive committee, and that showed rankings -- because we
3 had -- we must have had like 25 profit centers. They just kept
4 coming and coming. At the very top, of course, was Foot Locker
5 at a 17 percent return.

6 Lady Foot Locker had a 12 percent return.

7 Kids Foot Locker had a high return.

8 Northern Reflections, which was a Canadian operation,
9 high returns.

10 Then, as you gradually went down, you got smaller and
11 smaller.

12 And anything under 10 percent would be considered not
13 meeting margin, so then you go down to the loss divisions. But
14 on a whole, the company as a whole without restructuring was
15 still very viable. Restructuring was the whole issue, and the
16 restructuring could have been done many years earlier. It was
17 kind of pushed off to the end, where it got worse because you
18 had not tended to the flock.

19 But in reality, they were a healthy company. They
20 weren't in difficulties. I actually put together the bank
21 proposition that got us the loans with the -- so I know the
22 level of it.

23 But Woolworth itself had these most valuable leases,
24 unbelievable. They negotiated leases at 50 cents per square
25 foot in perpetuity which were never on the books. So there was

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Steven - recross

1 a great value which could be materialized. You go now and see
2 where Foot Locker's offices are. That is an old Woolworth
3 facility where they pay 50 cents a square foot.

4 THE COURT: All right. Thank you.

5 THE WITNESS: The point I'm making is that they were
6 not at the point of bankruptcy.

7 THE COURT: All right. Thank you.

8 Mr. Gottesdiener, you are all set?

9 MR. GOTTESDIENER: Yes. Thanks.

10 THE COURT: Thank you.

11 MR. RUMELD: One more question, your Honor.

12 THE COURT: Yes, Mr. Rumeld. You may proceed.

13 MR. RUMELD: I just want to hand up to the witness
14 Defendant's Exhibit 54.

15 THE COURT: All right.

16 RECROSS EXAMINATION

17 BY MR. RUMELD:

18 Q. Mr. Steven, you mentioned a few minutes ago that during
19 your deposition you had been shown a document that alerted you
20 for the first time about the fact that the starting balance was
21 discounted, is that right?

22 A. I found that out later, yes.

23 Q. Is this the document you were referring to that was shown
24 to you at your deposition?

25 A. I can't be totally sure of that. There are so many

F7mnosb6

Steven - recross

1 documents.

2 Q. Well, you looked at the footnote at your deposition?

3 A. I see the interest rate was 9 percent, assumed rate, yeah.

4 Q. And in the --

5 A. I remember seeing something to that effect, yes.

6 Q. Do you remember seeing -- do you remember reading, if you
7 look at the footnote, actuarial --

8 A. Yes, now I do.

9 Q. You do. That's the footnote you saw at your deposition?

10 A. Uh-huh.

11 Q. Yes?

12 A. Yes, sir.

13 MR. RUMELD: Thank you.

14 I have nothing further.

15 THE COURT: Thank you.

16 You may step down, sir.

17 Ladies and gentlemen, let's take our midafternoon
18 break. Then when we come back who is on deck and who will be
19 called Mr. Gottesdiener.

20 MR. GOTTESDIENER: Ms. Glickfield.

21 THE COURT: Ms. Glickfield. All right.

22 Thank you.

23 (Recess)

24 THE COURT: I was just checking on Mr. Gottesdiener's
25 time. So he understands he has two hours and 15 minutes left.

F7mnosb6

Steven - recross

1 Would you call your next witness.

2 MR. GOTTESDIENER: Ms. Glickfield.

3 THE COURT: Ms. Glickfield.

4 ELLEN GLICKFIELD,

5 called as a witness by the Plaintiffs,

6 having been duly sworn, testified as follows:

7 THE COURT: All right. Ms. Glickfield, please be
8 seated. It is important for you to pull the chair up so you
9 are close to the mic. You want to be close to it when you
10 speak, but not too close, there's sort a sweet spot, so it
11 doesn't fuzz up and you get the sound clearly.

12 There is a declaration in front of you, and I want to
13 start by having you confirm for the Court that is in fact your
14 declaration that you intend to have as your direct trial
15 testimony in this matter.

16 THE WITNESS: Yes.

17 THE COURT: All right. Do you swear to the truth of
18 the contents of that declaration?

19 THE WITNESS: I do.

20 THE COURT: The Court does accept Ms. Glickfield's
21 declaration as her direct trial testimony, and the witness is
22 turned over for cross-examination.

23 Mr. Rumeld, you may proceed, sir.

24 MR. RUMELD: Thank you, your Honor.

25 CROSS EXAMINATION

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Glickfield - cross

1 BY MR. RUMELD:

2 Q. Ms. Glickfield, you enjoyed working for Woolworth, is that
3 right?

4 A. Yes, I did.

5 Q. You were not surprised when you were laid off in January
6 2000, is that right?

7 A. No.

8 Q. Because things had been falling apart?

9 A. Yes.

10 Q. In fact, you testified that this was a very hectic time for
11 you because a lot of terminated employees needed benefit
12 estimates, right?

13 A. Yes.

14 Q. And that was one of the things you were responsible for?

15 A. Yes.

16 Q. While working for Woolworth, you prepared these benefit
17 estimates when employees were leaving employment, is that
18 right?

19 A. Yes.

20 Q. And you also prepared them upon request?

21 A. Yes.

22 Q. And you were supervised by Marion Derham?

23 A. Yes.

24 Q. But you did more estimates than she did, is that right?

25 A. Yes.

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Glickfield - cross

1 Q. You also fielded telephone calls?

2 A. Yes.

3 Q. People who had questions about their benefits?

4 A. Yes.

5 Q. You received about 30 calls a week, is that right?

6 A. Yes.

7 Q. Now, if you received a more difficult question you would
8 consult with Ms. Derham?

9 A. Yes.

10 Q. And sometimes you would respond to a phone inquiry by
11 writing a letter, is that right?

12 A. Yes.

13 Q. And sometimes Ms. Derham would help with that as well?

14 A. Yes.

15 Q. You testified that you often worked on benefit estimates
16 where the minimum lump sum was larger than the account balance,
17 is that right?

18 A. Yes.

19 Q. In fact, in most cases the benefit that based on the
20 participant was based on a minimum lump sum, is that right?

21 A. Yes.

22 Q. And in some cases you found that the minimum lump sum was
23 more than twice as much as the account balance?

24 A. Yes.

25 Q. Now, when the benefit was based on the minimum lump sum

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Glickfield - cross

1 rather than the account balance, you understood, didn't you,
2 that the credits, the pay and the interest credits really
3 didn't count toward that benefit, right?

4 A. I should -- yes.

5 Q. In your declaration you say that you thought the minimum
6 lump sum was some kind of IRS required additional payment?

7 A. Yes.

8 Q. In your deposition, am I right that you described the
9 minimum lump sum a little differently?

10 MR. GOTTESDIENER: Objection.

11 Q. Didn't you previously --

12 THE COURT: Sustained. Why don't you rephrase.

13 MR. RUMELD: Yes.

14 BY MR. RUMELD:

15 Q. Didn't you previously describe the minimum lump sum as an
16 enhancement of the December 31, 1995 benefit?

17 MR. GOTTESDIENER: Objection. If he's going to
18 impeach --

19 THE COURT: No. He can't impeach until she's made a
20 statement that she contradicted. He was going back and doing
21 that. It is perfectly appropriate. Why don't you reask the
22 question.

23 BY MR. RUMELD:

24 Q. Did you at one point understand the minimum lump sum to be
25 an enhancement of the pre-'96 benefit?

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Glickfield - cross

1 MR. GOTTESDIENER: Objection.

2 THE COURT: Overruled.

3 A. Yes.

4 Q. What you would do in completing these estimates was perform
5 a mathematical calculation to the pre-'96 benefit in order to
6 arrive at the minimum lump sum, is that right?

7 A. Yes.

8 Q. Part of that mathematical calculation involved the use of
9 the prevailing interest rate?

10 A. Yes.

11 Q. Now, in your declaration, you refer to an e-mail that you
12 received from Marion Derham that instructed you not to provide
13 the minimum lump sums for participants who were not terminating
14 employment within six months.

15 Do you remember that?

16 A. Yes.

17 Q. Do you remember saying that in your declaration?

18 A. Yes.

19 Q. Now, in light of that e-mail, you now dispute the assertion
20 that the minimum lump sum could not be projected into the
21 future?

22 MR. GOTTESDIENER: Objection.

23 Q. Is that your contention?

24 MR. GOTTESDIENER: Objection.

25 THE COURT: Overruled.

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Glickfield - cross

1 A. There was a caveat that we used. If we gave the date of
2 the estimate, and the factor involved and explained that it
3 could change, it could either go up or down.

4 Q. Am I correct that you do agree that if you projected the
5 minimum lump sum for sometime into the future, whatever figure
6 you projected would be subject to changes based on the movement
7 of interest rates?

8 A. Yes.

9 MR. RUMELD: May I approach, your Honor?

10 THE COURT: You may.

11 MR. RUMELD: I'm going to show you what's been marked
12 as Defendant's Exhibit 93.

13 BY MR. RUMELD:

14 Q. Defendant's Exhibit 93 are --

15 MR. HUANG: This is also plaintiff's number PX 1062.

16 THE COURT: Thanks.

17 MR. RUMELD: Thank you.

18 BY MR. RUMELD:

19 Q. These are benefit estimates that were prepared by
20 Ms. Derham?

21 A. Yes.

22 Q. You can tell because it says that in the bottom of each
23 page?

24 A. Yes.

25 Q. Do these look consistent with the type of estimates that

F7mnosb6

Glickfield - cross

1 were prepared out of your office?

2 A. I never formalized them this well.

3 Q. These are more formal than the ones you did?

4 A. Yes.

5 Q. Would you agree that both estimates are for the same
6 participant, the same date of birth, the same date of hire, the
7 same normal retirement date?

8 Do you see that?

9 A. Yes.

10 Q. Now, the first estimate is for a benefit payment date of
11 11/1/1998.

12 Do you see that?

13 A. Yes.

14 Q. What does that mean, benefit payment date?

15 A. When the benefit would be paid out.

16 Q. So --

17 A. It was a projection.

18 Q. It was a projection based on when the participant expected
19 to leave?

20 A. Yes.

21 Q. Or for a date the participant asked for an estimate?

22 A. It would have been the date that he asked for the estimate.

23 Q. Right. So a participant can call up and say could you give
24 me an estimate that assumes that my termination date will be
25 11/1/1998?

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Glickfield - cross

1 A. Yes.

2 Q. In this case the estimate was prepared less than a month
3 earlier, right, because it's dated 10/9/1998?

4 Do you see that?

5 Do you see on the bottom it says date prepared?

6 A. 10/9/98, yes.

7 Q. So in this case the estimate is prepared just a few weeks
8 before the benefit payment date?

9 A. Yes.

10 Q. So the interest rate is known in this case?

11 A. Yes.

12 Q. It's not going to change between October 9 and 11/1?

13 A. No.

14 Q. In this case you see the minimum lump sum is being
15 provided, correct?

16 A. Yes.

17 Q. If you could turn to the second page.

18 In this case the benefit payment date is 6/1/2008.

19 Do you see that?

20 A. Yes.

21 Q. It's ten years into the future, right?

22 A. Yes.

23 Q. Which means if you tried to do a projection, it would be
24 subject to the movement of interest rates?

25 A. Yes.

F7mnosb6

Glickfield - cross

1 Q. And the minimum lump sum could go up or down depending on
2 how the interest rates moved?

3 A. Yes.

4 Q. Would you agree with me that in this case there is no
5 minimum lump sum provided?

6 A. That's correct.

7 Q. If you look at the paragraph in the middle below the bolded
8 sentence that says, This statement is an estimate and is not a
9 guarantee of benefits.

10 Do you see that?

11 A. I'm sorry. Where are you?

12 Q. You see there --

13 A. It's an estimate, yes.

14 Q. Underneath there's the following paragraph: The lump sum
15 payment indicated above represents your estimated account
16 balance on your normal retirement date. This amount was
17 arrived at by projecting your January 1, 1998, account balance
18 with 6 percent interest through your normal retirement date.
19 The lump sum actually payable will be greater of your account
20 balance or a minimum lump sum. The minimum lump sum will be
21 determined by multiplying your annual accrued benefit by a
22 factor that is based on the mortality table and interest rate
23 in effect on your benefit payment date. Since we do not know
24 what interest rate will be in effect on your normal retirement
25 date, we are not able to calculate the minimum lump sum payable

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Glickfield - redirect

1 on that date.

2 A. Yes.

3 Q. Do you find anything inaccurate in that paragraph?

4 A. No.

5 Q. That's consistent with the type of disclaimer that you
6 referred to in your declaration?

7 A. Yes.

8 MR. RUMELD: Nothing further.

9 THE COURT: All right.

10 Thank you.

11 Mr. Gottesdiener, anything from you?

12 MR. GOTTESDIENER: Very briefly.

13 REDIRECT EXAMINATION

14 BY MR. GOTTESDIENER:

15 Q. Ms. Glickfield, you have a high school education?

16 A. Yes.

17 Q. Any post high school education?

18 A. No.

19 Q. Any training in doing an employee benefit calculations
20 other than on the job?

21 A. No.

22 Q. Did you need to understand what the factors meant that you
23 applied when you were doing calculations?

24 A. No.

25 Q. You were asked by defense counsel questions that suggested

F7mnosb6

Glickfield - redirect

1 that you had been inconsistent. Did you use both the term
2 kicker and enhancement in your deposition to explain what you
3 thought the minimum lump sum was?

4 A. Yes.

5 Q. What was your understanding based on all of the plan
6 materials you got as a participant as well as somebody who
7 worked in benefits was happening at the point of the change
8 from the old plan to the new plan in terms of what your benefit
9 was?

10 A. My frozen 12/31/95 accrual was changed into a cash balance
11 account.

12 Q. Did you think that was done at full value, full benefit?

13 A. I thought so.

14 Q. And you thought it was picking up where you left off --

15 A. Yes.

16 Q. -- and then adding new credits?

17 Then what did you think when you were doing
18 calculations and people got more than their account with this
19 minimum lump sum that you were calculating?

20 What did you think that was?

21 A. At that time I thought it was great, that it was the
22 government stepping in with a provision, and I could offer them
23 the bigger number.

24 Q. Did you have any idea that the benefits you were
25 calculating in your own benefit, it was actually frozen and

F7mnosb6

Glickfield - redirect

1 that you weren't earning anything after 1996?

2 MR. RUMELD: Objection.

3 THE COURT: Hold on. Sustained.

4 Why don't you rephrase.

5 BY MR. GOTTESDIENER:

6 Q. Did you believe that that minimum lump sum was actually a
7 representation that the company had frozen everybody's benefit?

8 A. I am not sure I know what you mean, which benefit?

9 (Continued on next page)

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F7MJOSB7

1 Q. From 12-31-95 you said you thought you got full value and
2 that you were adding to it in your account. Is that fair?

3 A. That's correct.

4 Q. And then you said that you thought the minimum lump sum was
5 a great additional enhancement or kicker that people got
6 sometimes depending on interest rates that the federal
7 government required. Is that fair?

8 A. Yes.

9 Q. My question is, did you have any idea that that was, in
10 fact, not true while you were there on the job and that it was
11 kind of the other way around?

12 A. No.

13 Q. If you had known, if you had known what you know now, what
14 do you think you would have done?

15 A. I would have been upset. I would have been very vocal.

16 MR. GOTTESDIENER: No further questions.

17 THE COURT: Anything from you, Mr. Rumeld?

18 MR. RUMELD: No, your Honor.

19 THE COURT: Thank you. You may step down,
20 Ms. Glickfield.

21 (Witness excused)

22 THE COURT: Who is going to be the next witness?

23 MR. RUMELD: The next witness will be Marion Derham.

24 THE COURT: Is Mr. Gottesdiener, do you have any
25 additional witnesses from the plaintiff?

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1 MR. GOTTESDIENER: No, your Honor, no.

2 THE COURT: Subject to the receipt of all the
3 documents into evidence, and the court has already received the
4 deposition designations subject to the objections, does the
5 plaintiff rest?

6 MR. GOTTESDIENER: Yes, your Honor.

7 THE COURT: So will the defense, please, call their
8 first witness.

9 MR. RUMELD: We call Marion Derham.

10 THE COURT: So there is no declaration for Ms. Derham.
11 Am I correct?

12 MR. RUMELD: Correct.

13 THE COURT: I want to make sure the absence of one is
14 expected.

15 MR. RUMELD: Can I just ask your Honor while we are
16 waiting, it is about 4:00 o'clock. I believe I am going to
17 need the remaining time to complete my examination. I could
18 call Mr. Rachal and Mr. Sher to come down because he would be
19 the only remaining witness, but I am kind of assuming if I
20 succeed in finishing Ms. Derham, we'll just start tomorrow
21 morning?

22 THE COURT: Don't call and have them come down. We
23 can deal then with logistical issues. Don't expand the
24 testimony beyond where it needs to go, but I won't then require
25 you to call Mr. Sher this afternoon. We'll start with him, I

F7MJOSB7

Derham - direct

1 would hope, in the morning then.

2 MR. RUMELD: Yes.

3 THE COURT: Please be seated. It will be important --
4 actually, Joe, a little knob on the microphone sort of has come
5 off its thing. There we go. All right. Easy as that!

6 It will be important for you to speak directly into
7 the mike so we can get a good sound, all right?

8 THE WITNESS: Yes.

9 THE COURT: If you need to pull up your chair, you can
10 do that.

11 MARION DERHAM,

12 called as a witness by the Defendant,

13 having been duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. RUMELD:

16 Q. Good afternoon Ms. Derham. Do you remember meeting me once
17 before?

18 A. You look familiar.

19 Q. Do you remember having your deposition taken in this case a
20 couple of years ago?

21 A. Yes.

22 Q. Do you remember seeing me at that deposition?

23 A. It could be from then, yes.

24 Q. Did we ever get together to go over your testimony, prepare
25 your testimony?

F7MJOSB7

Derham - direct

1 A. No.

2 Q. Did any other lawyers for Foot Locker ever prepare you for
3 testimony?

4 A. No.

5 Q. You're here by virtue of the subpoena that the plaintiffs
6 served on you?

7 A. Correct.

8 Q. Could you tell me about your employment with Woolworth or
9 any affiliate of Woolworth.

10 A. Okay. I started in 1979 with Kenney Shoe Corporation in
11 the medical area, I believe it was the medical insurance
12 enrollment. I did some medical claims. I worked in the
13 retirement plan area, the stock purchase plan area and 401 (k)
14 plan area.

15 Q. Through what period of time was that?

16 A. I worked through, it was November of 2006.

17 Q. Are you able to remember what you were doing in the
18 mid-1990's?

19 A. Yes, I worked in the retirement plan area. The 401 (k)
20 plan was started in the mid-1990's and the stock purchase plan
21 as well. I wasn't in the medical area at that point.

22 Q. Do you remember whether it was a stock purchase plan or a
23 cash balance plan, or are you talking about a different plan?

24 A. Two different plans. There was an employee stock purchase
25 plan. There was a retirement plan and a 401 (k) plan, so three

F7MJOSB7

Derham - direct

1 different plans actually.

2 Q. Did you work on the retirement plan as well?

3 A. Yes, yes, that is what I said.

4 Q. What specifically were your responsibilities?

5 A. My responsibilities?

6 Well, I worked in the administrative section of the
7 retirement plan. I worked under several different people. I
8 did retirement calculations. I did communications to people,
9 things to that effect.

10 Q. Who was your immediate supervisor?

11 A. Carol Kanowicz.

12 Q. Anyone else?

13 A. No. She was -- well, she left just before I did in 2006,
14 and I think after she left I believe Julie Bloom was my
15 immediate supervisor if I remember correctly. It could have
16 been Julie. It might have been Kevin, but I think it was
17 Julie.

18 Q. Have you been employed since leaving Foot Locker in 2006?

19 A. I have done volunteer work, not employed for monetary
20 purposes, no.

21 Q. Have you done any pension-related work since 2006?

22 A. No, no, not at all, no.

23 Q. Now, while you were employed at Foot Locker, you were
24 located in the New York office?

25 A. Yes.

F7MJOSB7

Derham - direct

1 Q. Did you work with people in Milwaukee?

2 A. Yes.

3 Q. How did your job relate to theirs?

4 A. Milwaukee did the day-to-day administration. They took a
5 lot of phone calls from people and they ran calculations and
6 they consulted with the New York office. We provided them with
7 direction on what they should be doing.

8 Q. Were you one of the people who provided direction?

9 A. Yes.

10 Q. Were you one of the principal contacts for the people?

11 A. Yes, I was a principal contact, yes.

12 Q. Did there come a point in time when the responsibilities of
13 the folks in Milwaukee changed?

14 A. Yes, I would say yes, but I don't know, I don't remember
15 the details of how the responsibilities changed.

16 Q. Do you remember whether at some point their
17 responsibilities were outsourced?

18 A. Outsourced, yes, yes, yes, I was just thinking about it
19 and, yes, I did remember that.

20 Q. To whom were these responsibilities outsourced?

21 A. Mercer, William Mercer did calculations after they did.

22 Q. After Milwaukee did, Mercer did?

23 A. Yes.

24 Q. Do you know when that transition took place?

25 A. If I remember correctly, it was in the Year 2000 because

F7MJOSB7

Derham - direct

1 the systems were not ready for the Y2K and they couldn't handle
2 any of the upgrades, so those financials were transferred out.

3 Q. So a participant leaving the company after 2000 would get
4 his retirement package from Mercer, not from Milwaukee?

5 A. I believe so, yes.

6 Q. And a participant who had inquiry about the calculation of
7 his or her benefits, if the inquiry was after 2000, it would be
8 made to Mercer and not to Milwaukee. Is that right?

9 A. I believe so, but I am not a hundred percent on that, but I
10 believe so.

11 Q. A participant requesting a benefit estimate after 2000,
12 would that come from Mercer or from Milwaukee?

13 A. You know, I think Mercer, but logically from what we're
14 talking about it would be Mercer, but my memory is not clear on
15 that, but I would think it would be Mercer.

16 THE COURT: It is important that we get your best
17 recollection.

18 THE WITNESS: Okay.

19 THE COURT: It is a long time ago, so if you don't
20 recall, just say you don't recall. We don't want you to
21 speculate.

22 THE WITNESS: Okay. I honestly don't recall
23 specifically.

24 THE COURT: Thank you.

25 BY MR. RUMELD:

F7MJOSB7

Derham - direct

1 Q. Now, you do you have a recollection of the defined benefit
2 plan being amended in the mid-1990's?

3 A. Yes.

4 Q. What do you recall about that?

5 A. It was changed from a traditional defined benefit plan to a
6 cash balance plan.

7 Q. How did that change come about?

8 A. All of the plans were reviewed, meaning I think the
9 retirement plan and the medical plans, they were reviewed in
10 order to do cost containment and cost cutting, and that's how
11 the change came to take place.

12 Q. Did you have a role in coming up with the change?

13 A. Not coming up with the change necessarily, but as I recall,
14 our actuary provided different scenarios to review, so I
15 believe the scenarios were brought up by the actuary. We did
16 not internally come up with the scenarios or the changes that
17 could take place.

18 Q. Could you explain what you mean by, "scenarios."

19 A. I think there were several different changes to the
20 retirement plan that were suggested, one of which was the cash
21 balance plan. If I remember correctly, other changes, other
22 potential changes were to reduce the formula.

23 One of the changes was to terminate the plan, reduce
24 the formula. That is all I can recall at this point.

25 Q. Who was involved with working with Mercer over these

F7MJOSB7

Derham - direct

1 alternative proposals?

2 A. Initially there was myself, Carol, Tom and Eileen I believe
3 the woman's name was. She worked for Tom. There was a group
4 of us that worked on preparing the different scenarios for
5 further review.

6 Q. Why was the cash balance plan chosen amongst those
7 scenarios?

8 A. I don't recall specifically why. I don't recall
9 specifically why.

10 Q. Do you remember any features of the cash balance design
11 that you viewed to be more favorable than the other scenarios?

12 A. The cash balance plan had a lump sum feature that was
13 thought to be favorable. The fact that you could take the lump
14 sum as long as you were vested, you could take the lump sum
15 when you left. You didn't have to wait until retirement age to
16 collect the benefit. That's the only feature I remember, the
17 one I remember.

18 Q. Is it also the case that amending the defined benefit plan
19 to a cash balance formula was expected to save money?

20 A. Yes, yes.

21 Q. That was still the objective?

22 A. Yes, the overall objective was to save money, yes.

23 Q. Do you remember who initially recommended the cash balance
24 alternative?

25 A. It was recommended by the actuary, by Mercer who was our

F7MJOSB7

Derham - direct

1 actuary, Foot Locker actuary at the time.

2 Q. Did Mercer make this recommendation to your group, the four
3 people you you described?

4 A. Yes.

5 THE COURT: Do you recall that clearly or is it -- let
6 me put it differently.

7 THE WITNESS: Okay.

8 THE COURT: The question was do you remember who
9 initially recommended the cash balance alternative, and your
10 recollection is Mercer?

11 THE WITNESS: My recollection is that it was Mercer.

12 THE COURT: Okay.

13 THE WITNESS: Yes.

14 THE COURT: How clear is that recollection?

15 THE WITNESS: None of my recollections regarding this
16 testimony are completely clear. I remember that that was the
17 way it happened, but to the best of my recollection.

18 THE COURT: Let me ask it this way.

19 Do you recall whether or not Tom Kiley came up with
20 the idea of a cash balance plan first or whether or not, in
21 your recollection, it was Mercer that came up with it first?

22 THE WITNESS: I don't remember. I don't remember if
23 it was Tom or Mercer first. I don't remember.

24 THE COURT: All right. Right now your best
25 recollection is it was Mercer?

F7MJOSB7

Derham - direct

1 THE WITNESS: My best recollection. Could it have
2 been Tom? I suppose.

3 THE COURT: I don't want you to guess.

4 THE WITNESS: I am not.

5 THE COURT: Do you remember Tom Kiley coming up --

6 THE WITNESS: I don't remember that he came up with it
7 first, no, I don't remember that.

8 THE COURT: You may proceed.

9 BY MR. RUMELD:

10 Q. Do you remember whether one of the alternative scenarios
11 that your group considered was a temporary freezing of the
12 benefits?

13 A. Yes.

14 Q. What became of that alternative?

15 A. It was declined.

16 Q. Do you know why?

17 A. I don't recall.

18 Q. Do you recall anyone ever suggesting to you that the cash
19 balance conversion was like a temporary freeze in the benefits?

20 A. If I recall it clearly? I am sorry, but, yes, I recall
21 that, yes.

22 Q. How did the cash balance plan operate?

23 A. It changed the benefit payable at normal retirement date to
24 a lump sum that was paid when the participant left. It
25 converted it.

F7MJOSB7

Derham - direct

1 Q. There was an account balance?

2 A. There was an account balance. The first part of it was an
3 account balance. The person's accrued benefit was changed to
4 an initial account balance, and then that was increased over
5 time. I don't remember the exact formula, but it was increased
6 with -- I believe the term was pay credits and interest. I
7 don't remember what interest rate it was increased by.

8 Q. How was the benefit calculated when the participant
9 terminated employment?

10 A. The cash balance amount, the account balance was brought up
11 with those two items and that would be the person's account
12 balance. There was another calculation done. It was called
13 the minimum lump sum. I don't remember exactly how that was
14 calculated, but it was -- I don't remember the exact
15 calculation to get a minimum lump sum, but there were two, two
16 things, the account balance and the minimum lump sum that were
17 compared, and the person would get the higher of the two
18 amounts.

19 Q. Do you know what the minimum lump sum was based on?

20 A. It was based on the accrued benefit, and there was some
21 formula applied to the accrued benefit. I don't remember what
22 the formula was.

23 Q. What do you mean by the, "accrued benefit"?

24 A. An accrued benefit is an amount that would be paid at
25 normal retirement age. You're looking at me --

F7MJOSB7

Derham - direct

1 Q. I get to ask the questions.

2 A. -- you're looking at me like I have two heads, okay?

3 Q. Do you know through what date the accrued benefit was
4 calculated?

5 A. It was calculated -- I don't recall. I don't recall. I
6 was going to speculate, but I don't recall.

7 Q. Now, what was your understanding of a plan freeze?

8 A. A plan freeze meaning, well, that there was nothing added
9 to what was already accumulated.

10 Q. In your mind, was that what was happening in the cash
11 balance plan?

12 A. No, no, because there was an addition to the account
13 balance.

14 Q. Now --

15 A. Did I answer that correctly?

16 THE COURT: We just want to get your best
17 recollection, so don't worry about what we think about the
18 answers. It is not a test, just getting your best
19 recollection.

20 THE WITNESS: Okay.

21 BY MR. RUMELD:

22 Q. Did you have any responsibilities in connection with the
23 communications that were sent to the plan participants about
24 the cash balance amendments?

25 A. Yes, there were communications, yes, and I was part of

F7MJOSB7

Derham - direct

1 that, part of preparing the drafts of the communication, yes.

2 Q. Do you remember specifically what communications you were
3 involved with?

4 A. There were retirement packages that were sent out to people
5 who said they wanted to retire. There were letters sent out to
6 people who left but didn't want to collect their benefit at
7 that time. There were summary plan descriptions, the booklets.

8 Q. Anything else?

9 A. There must have been more, but there were a lot of
10 communications prepared, but I can't recall offhand anything
11 else.

12 Q. If I were to separate the individual communications from
13 communications sent generally to all the employees, did you
14 work on the communications that went to all the employees?

15 A. Yes.

16 Q. Who else worked on those communications?

17 A. The group of four that I mentioned, and after we prepared
18 the drafts, the communications were reviewed by the internal
19 legal department, and I recall that they were reviewed by Pat
20 Peck and -- who else? I don't recall anyone else.

21 Q. When you were involved in these communications, what
22 specifically were you trying to do?

23 A. The SPD was meant to provide a description of the plan to
24 the participants, how the formula worked and what they had to
25 do when they went to collect their benefit, things to that

F7MJOSB7

Derham - direct

1 effect. The retirement packages had specific benefit
2 information and benefits. The form of benefit election was on
3 there. People had to choose what form they wanted their
4 benefit in, a lump sum, a monthly payment, like that. It was
5 generally about providing information to the participants about
6 the plan, provisions of the plan and benefits derived from the
7 formula.

8 Q. Did you ever have any concerns that these communications
9 were false?

10 A. No.

11 Q. Did you ever have any concerns that they were misleading?

12 A. No.

13 Q. Did you ever receive any instructions not to provide
14 certain types of information to participants?

15 A. Not that I could recall, no, not that I recall.

16 Q. I want to show you what has previously been marked as
17 Exhibit 29.

18 MR. RUMELD: May I approach, your Honor?

19 THE COURT: You may.

20 THE COURT: Is it 29, DX or PX?

21 MR. RUMELD: That is the DX. I am sure somebody will
22 provide the PX.

23 THE COURT: That is 2 or 4? I've got it. Thank you.

24 BY MR. RUMELD:

25 Q. Ms. Derham, I see you looking at this document. I want to

F7MJOSB7

Derham - direct

1 know whether it looks familiar to you?

2 A. It looks familiar.

3 Q. Do you know what it is?

4 A. Reading the subject, yes, the highlights of the amended
5 retirement plan.

6 Q. Did you work on this document at the time?

7 A. I don't recall this specific document. I don't recall.

8 Q. Is there any reason why you would not have been involved?

9 A. No, there is not that I, not that I can think of, no.

10 Q. It would be consistent with the practices of your group
11 that these types of communications you would work on?

12 A. Yes.

13 THE COURT: Let me ask so it is clear. Was it
14 generally the case that you would work on each of the mass
15 communications that would go to all employees relating to the
16 pension area?

17 THE WITNESS: Yes, that was generally the case.

18 THE COURT: Thank you. You may proceed, Mr. Rumeld.

19 BY MR. RUMELD:

20 Q. Would it be part of your responsibilities to make sure that
21 documents like these were accurate?

22 A. Yes.

23 Q. Do you remember there were annual pension statements given
24 to the participants?

25 A. Yes.

F7MJOSB7

Derham - direct

1 Q. Did you work on those as well?

2 A. Yes.

3 THE COURT: Why don't you hand that to the witness and
4 let me have counsel over the the sidebar briefly. Give it to
5 the witness so she can look at it so we don't take up too much
6 time.

7 (At the sidebar)

8 THE COURT: I just want to find out how much you have
9 left because I don't think we should have her back tomorrow. I
10 want to turn her over to cross. How much cross do you think
11 you have?

12 MR. GOTTESDIENER: Very little.

13 THE COURT: If he leaves you 10 minutes, are you going
14 to be good?

15 MR. GOTTESDIENER: I think.

16 THE COURT: We are going to get her off the stand. I
17 want to get a sense of how long you think you need? 10
18 minutes, do you need more than that?

19 MR. GOTTESDIENER: I don't think so.

20 MR. RUMELD: I think I can try in 15 minutes. I have
21 a little discretion and I have the same concern. I think your
22 Honor can appreciate why.

23 THE COURT: I understand. I want to make sure we get
24 her off the stand today. Take your best questions till a
25 quarter of and then turn her over to Mr. Gottesdiener.

F7MJOSB7

Derham - direct

1 (In open court)

2 BY MR. RUMELD:

3 Q. Ms. Derham, does this statement look familiar to you?

4 A. It does look familiar, yes.

5 Q. Do you remember working on this statement?

6 A. Yes. I don't remember specifics about working on it, but,
7 yes, I remember this statement, yes.

8 MR. RUMELD: My apologies, your Honor, but since we
9 did the sidebar, I didn't announce the exhibit numbers.

10 BY MR. RUMELD:

11 Q. Defendant's Exhibit 311, you do remember working on it?

12 A. Yes, yes.

13 Q. Would it have been your practice to review this statement
14 with a view towards making sure it was accurate?

15 A. Yes.

16 Q. If there was anything in here that you felt was inaccurate
17 or misleading, would you have called it to the attention of
18 your peers?

19 A. Yes.

20 Q. Now, you had responsibilities in connection with the
21 preparation of pension estimates?

22 A. Yes. I actually prepared some estimates myself and
23 reviewed calculations of estimates that were prepared
24 elsewhere. Not all of them, but some of them.

25 Q. "Elsewhere," meaning?

F7MJOSB7

Derham - direct

1 A. Meaning either Milwaukee when they were prepared there or
2 Mercer when they were prepared there.

3 Q. Did you work with Ellen Glickfield?

4 A. Yes.

5 Q. She worked for you?

6 A. Yes, yes, she reported to me.

7 Q. Did she also prepare estimates?

8 A. Yes, yes, yes, she did.

9 Q. Under what circumstances were estimates prepared?

10 A. Based on the request of the participant, and we also
11 prepared estimates for or reports of who requested them.

12 Occasionally, we were requested to provide estimated
13 retirement benefits on certain employees, to the vice president
14 and people like that.

15 Q. What about when a participant's employment was terminated,
16 would an estimate be prepared then?

17 A. Well, a vested letter would be prepared, yes, which was the
18 form of an estimate, a letter saying what they would be
19 entitled to receive, yes.

20 MR. RUMELD: May I approach, your Honor?

21 THE COURT: You you may.

22 BY MR. RUMELD:

23 Q. I am going to show you what has been previously marked as
24 Defendant's Exhibit 95.

25 A. Okay.

F7MJOSB7

Derham - direct

1 MR. HUANG: The same as PX-1066, your Honor.

2 THE COURT: Thank you.

3 BY MR. RUMELD:

4 Q. Does that document look familiar to you?

5 A. Yes, it does.

6 Q. It says on the top, "Estimated Pension Benefits." Is that
7 what you would refer to as an estimate?

8 A. Yes. I don't recall this specific document. It looks
9 familiar, but yes.

10 Q. Is the form of the document consistent with the type of
11 information you would provide?

12 A. Yes.

13 Q. If it says on the bottom, "Prepared by Marion Derham," is
14 it safe to assume you prepared this document?

15 A. I could have, yes.

16 Q. Well, I am trying to understand procedurally, would the
17 name on the bottom --

18 A. It would be consistent with procedures, yes.

19 Q. For example, if Ellen Glickfield prepared an estimate,
20 would she have her name on the bottom?

21 A. Yes.

22 Q. Is it fair to say that you prepared a lot of estimates that
23 looked like these?

24 A. Yes.

25 Q. Did you ever experience any issues where the participant

F7MJOSB7

Derham - direct

1 complained they didn't understand the estimates?

2 A. Yes, but I don't remember specifics about that.

3 Q. Were there occasions when you would follow up with a
4 participant who had questions?

5 A. Yes.

6 Q. Participants were able to reach out to you if they had
7 questions?

8 A. Yes.

9 Q. Do you remember whether participants had questions about
10 the calculation of the minimum lump sum?

11 A. Yes, some did.

12 Q. What would you tell them?

13 A. I don't recall exactly what I told them.

14 THE COURT: Don't speculate if you don't recall.

15 THE WITNESS: I don't recall exactly what I told them.

16 BY MR. RUMELD:

17 Q. Was it generally your practice to be as informative as you
18 could be?

19 A. Yes.

20 (Continued on next page)

F7mnosb8

Derham - direct

1 Q. Do you remember whether there were any restrictions on
2 providing minimum lump sum information into the future?

3 THE COURT: You mean whether or not, for instance, if
4 Ms. Derham received a question from a participant about a
5 minimum lump sum, and the question was requesting information
6 relating to a minimum lump sum in the future, whether you were
7 restricted or otherwise --

8 THE WITNESS: You mean --

9 THE COURT: -- told not to provide that information?

10 THE WITNESS: Do you mean something that would be
11 paid, like if someone asked me for something today, a minimum
12 lump sum that would be paid a year from today?

13 Is that what the --

14 THE COURT: It could be a year from today, six months
15 from today, and they may not even have a termination date. Any
16 of those scenarios.

17 THE WITNESS: Yes. There were restrictions on
18 providing minimum lump sums at future dates.

19 THE COURT: What was your understanding as to what
20 those restrictions were?

21 THE WITNESS: I don't recall how far in the future the
22 restrictions went. I believe the restriction was put in place
23 to my recollection because of something having to do with the
24 interest rates and, depending on what the interest rates were,
25 the minimum lump sum could be different, calculated using a

F7mnosb8

Derham - direct

1 different interest rate.

2 THE COURT: All right. Thank you.

3 Were you done or did you have more to add?

4 THE WITNESS: No. That's basically it.

5 BY MR. RUMELD:

6 Q. I would like to show you what's previously been marked as
7 Defendant's Exhibit 112.

8 MR. RUMELD: May I approach, your Honor?

9 THE COURT: You may.

10 MR. HUANG: This is PX 162.

11 THE COURT: All right. Thank you.

12 THE WITNESS: OK. I'm ready.

13 BY MR. RUMELD:

14 Q. Do you remember this e-mail?

15 A. No, I don't recall this e-mail.

16 Q. Do you remember providing information to employees in
17 Greenville about their retirement benefits?

18 A. Not specifically. Not specifically to Greenville, but I --

19 Q. Do you remember generally providing --

20 A. We generally provided information to associates, yes.

21 Q. Let me show you what's previously been marked as
22 Defendant's Exhibit 47.

23 A. OK.

24 MR. RUMELD: May I approach?

25 THE COURT: Yes.

F7mnosb8

Derham - direct

1 MR. RUMELD: I think your Honor has this one.

2 MR. HUANG: PX 99.

3 THE WITNESS: This does look familiar. OK.

4 BY MR. RUMELD:

5 Q. Do you remember preparing those materials?

6 A. I don't specifically remember preparing these, but they do
7 look familiar.

8 Q. Do you know whether materials like these were provided to
9 various locations?

10 A. I don't recall.

11 Q. Do the examples look familiar to you?

12 A. They do.

13 Q. Do you know if you prepared them?

14 A. This looks to me as if I prepared them, but I don't recall
15 doing it. I --

16 Q. You don't recall whether these same examples might have
17 been used elsewhere?

18 A. Excuse me? Could you repeat.

19 Q. Do you recall if these examples were used in other
20 locations besides Greenville?

21 A. Something is saying that -- I don't recall specifically.
22 They may have been. They may have been used for other
23 locations, but I don't recall specifically.

24 Q. Well, was generally your practice to prepare template
25 materials for use at multiple locations?

F7mnosb8

Derham - cross

1 A. Yes, it was.

2 Q. Did you also visit locations to provide information?

3 A. Yes.

4 Q. How frequently did you do that?

5 A. Oh, gee. Well, OK, we are looking at the year 1996 here.

6 There were, at the time the plan changed in 1996, I visited

7 several locations, as did Carol and Rita. After that point, I

8 don't remember exactly when we visited and how many locations,

9 but there were -- during the plan change there were quite a few

10 visits to different locations.

11 Q. One more question. When you visited these locations, were

12 you ever placed under any restrictions as to what type of

13 information to provide the employees?

14 A. Not that I can recall, no.

15 MR. GOTTESDIENER: Thank you very much.

16 THE WITNESS: You're welcome.

17 THE COURT: Mr. Gottesdiener.

18 CROSS EXAMINATION

19 BY MR. GOTTESDIENER:

20 Q. Good afternoon, ma'am.

21 Do you recall that I took your deposition a few years
22 ago in this case?

23 A. Yes.

24 Q. You said at the top of the questioning by defense counsel

25 that the team, or the four of you were seriously considering a

F7mnosb8

Derham - cross

1 range of options for saving money, a temporary plan freeze, a
2 reduction in the formula of the existing plan, and possibly
3 terminating the plan?

4 A. Yes, I did say that.

5 Q. You said at one point that someone suggested during the
6 course of your review that the cash balance conversion that was
7 ultimately adopted, that it operated like a temporary freeze?

8 A. Um -- yes.

9 Q. That was the wear-away effect?

10 A. You know, you asked me about that wear-away the last time,
11 and I would say based on the last -- based on the deposition,
12 yes, that was the wear-away effect, yes.

13 THE COURT: Did you ever use the term or hear the term
14 used wear-away?

15 THE WITNESS: I have heard the term used, specifically
16 in, in what specific situations, I don't recall, but I --

17 THE COURT: Do you recall whether or not you heard
18 that term back in the late '90s when the plan changes went into
19 effect, sometime in the couple of years --

20 THE WITNESS: It could very well be, yes.

21 THE COURT: You don't recall right now?

22 THE WITNESS: I don't recall specifically when that
23 term was used, no.

24 THE COURT: All right.

25 BY MR. GOTTESDIENER:

F7mnosb8

Derham - cross

1 Q. Let me just try this because it was a while ago.

2 A. OK.

3 Q. Page 77, line 17:

4 "Q. And wear-away is a phenomenon where for one reason or
5 another there's no growth in someone's pension benefits for a
6 period of time.

7 "Does that sound familiar?"

8 A. That sounds familiar.

9 BY MR. GOTTESDIENER:

10 "A. It sounds familiar, yes.

11 "Q. And that was something that Jim and others on the task
12 force talked about and knew about would be a potential
13 consequence of the conversion?

14 "A. Yes."

15 A. Yes.

16 Q. You gave that testimony, right?

17 A. It sounds familiar.

18 MR. RUMELD: Objection.

19 THE COURT: You are not impeaching her and one of the
20 questions has an embedded problem in terms of what Jim or
21 whoever else would have known. If you would like some
22 testimony, why don't you on those topics, just ask her and you
23 will have it clearly in the record.

24 Q. You heard the term wear-away before in connection with the
25 consideration of changes to the plan in the '90, correct?

F7mnosb8

Derham - cross

1 A. Yes.

2 Q. And you understood that what that phenomenon meant was that
3 people would not be accruing any new benefit for a period of
4 time?

5 A. Yes.

6 Q. The communications that you assisted in preparing that went
7 out to all participants as well as individual participants, you
8 agree that in none of those communications did you ever see any
9 communication that communicated wear-away, the wear-away effect
10 to anybody?

11 A. Not that I recall.

12 MR. RUMELD: Objection.

13 A. Not that I recall.

14 THE COURT: Overruled.

15 MR. RUMELD: Your Honor, could I just --

16 A. I remember going over this at the deposition.

17 Q. Uh-huh.

18 A. And I believe we read through several different documents
19 that didn't have any information to that effect in them.

20 THE COURT: All right. Let me just hear --

21 MR. RUMELD: I would like to get a clarification. I
22 don't want to gum things up here, but this is a witness who is
23 still a class member and both sides identified her as a
24 witness. I just want to know whether Mr. Gottesdiener is
25 expected to be able to ask leading questions under these

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Derham - cross

1 circumstances.

2 THE COURT: If you object as leading, I would not
3 allow either of you to lead. But until there is an objection,
4 I just let it go. So try not to lead.

5 MR. RUMELD: Well --

6 THE COURT: All right. The witness is not identified
7 as hostile to either party, and therefore neither party should
8 lead.

9 BY MR. GOTTESDIENER:

10 Q. So, if I am understanding your last answer, you recall
11 reviewing communications at the deposition --

12 A. Yes.

13 Q. -- that you worked on?

14 A. Yes.

15 Q. Did any of those communications tell participants that the
16 purpose of the change was to save the company money?

17 A. No, not that I recall. No.

18 Q. Did any of those communications tell participants that the
19 effect of the change for a large number of participants would
20 or might be that they would stop accruing new benefits for a
21 period of time?

22 MR. RUMELD: Objection.

23 A. Not that I recall.

24 THE COURT: Hold on.

25 THE WITNESS: Oh.

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1 THE COURT: Sustained. You have to ask it
2 differently.

3 BY MR. GOTTESDIENER:

4 Q. Did you see in any of communications that you --

5 THE COURT: I think you are going to run into the same
6 problem. You can try it.

7 BY MR. GOTTESDIENER:

8 Q. In the communications that you worked on, did they discuss
9 growing account benefits?

10 A. Yes. Growing account benefits, yes.

11 Q. Did any of the communications you worked on inform the
12 participants that growth in their account was not necessarily
13 also growth in their benefit?

14 A. I don't think so, not that I recall. I don't recall
15 anything like that being in there.

16 Q. Do you remember you testified in response to counsel's
17 questions about a minimum lump sum?

18 A. Yes.

19 Q. Do you believe that disclosure of the concept and the
20 existence of the minimum lump sum or a greater of this or that,
21 do you think that that disclosed a wear-away to participants?

22 A. Specifically disclosed a wear-away, no.

23 Q. You agree that just disclosing the existence of this
24 greater of or minimum lump sum, it doesn't disclose the
25 wear-away?

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1 A. Correct.

2 MR. GOTTESDIENER: The Greenville document. If you
3 put on the screen PX 99 for a moment.

4 THE WITNESS: DX 99?

5 Q. I don't think you have it in front of you. It is the same
6 document. It is just our version of it.

7 Do you see your signature there?

8 A. Yes.

9 Q. It's directed to Doris Albright?

10 A. Yes, I see it.

11 Q. Did you know Doris Albright?

12 A. I don't recall meeting her, but I may have.

13 Q. You would agree that the document and the examples that are
14 attached does not disclose that there were no benefits being
15 accrued after 12/31/95?

16 A. I haven't read through it that specifically, but -- I would
17 have to read through it specifically in order to determine
18 that. I don't recall exactly what was in this document, so I
19 can't --

20 Q. OK. At your deposition --

21 A. Uh-huh.

22 Q. -- do you remember we talked about the document at your
23 deposition?

24 A. I remember talking about many documents. I don't recall
25 speaking about this specific document.

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1 Q. OK. Line 15, page 315, of your deposition we are talking
2 about this document and I asked you: "Does it disclose the
3 concept?" That is, of the wear-away.

4 "A. There was no -- it doesn't disclose that there were no
5 accrued benefits from -- after 12/31/95. No, it does not
6 disclose that."

7 You gave that testimony, didn't you?

8 MR. RUMELD: Objection.

9 A. I don't deny that, yes.

10 THE COURT: Well --

11 THE WITNESS: I recall reading through.

12 THE COURT: I will allow it as impeachment.

13 You may answer.

14 THE WITNESS: OK.

15 THE COURT: The question is only do you recall giving
16 the testimony?

17 THE WITNESS: OK.

18 I recall, I recall the testimony, yes.

19 THE COURT: All right.

20 BY MR. GOTTESDIENER:

21 Q. You also remember that this was a snapshot of -- telling us
22 that it was a snapshot of a day? It was not moving through
23 time disclosing wear-away?

24 THE COURT: What's the "it"?

25 MR. GOTTESDIENER: The Greenville summary.

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Derham - cross

1 THE COURT: PX 99?

2 MR. GOTTESDIENER: Yes.

3 THE COURT: All right.

4 MR. GOTTESDIENER: With those examples.

5 THE COURT: I will allow it.

6 A. If I recall that? Yes, it's a snapshot in time.

7 Q. So it's not moving through time disclosing wear-away,
8 correct?

9 A. It's not moving through time, correct.

10 Q. Disclosing wear-away? No new benefit accruals? It doesn't
11 disclose that?

12 A. It doesn't specifically state no new benefit accruals,
13 correct.

14 Q. Or show that?

15 A. Or show it, right.

16 MR. GOTTESDIENER: No further questions.

17 THE COURT: All right. Thank you.

18 OK. Ms. Derham you may step down. You are excused.

19 Thank you very much.

20 THE WITNESS: Thank you.

21 THE COURT: Be careful getting off the witness stand
22 there. There is a step. We will talk about a few logistics
23 and then we will end for the evening ourselves.

24 (Witness excused)

25 THE COURT: In terms of next witnesses, as I

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Derham - cross

1 understand it, the witness that is left is Mr. Sher.

2 Am I correct?

3 MR. RUMELD: Correct, your Honor.

4 THE COURT: He would be called first thing tomorrow
5 morning. Also correct?

6 MR. RUMELD: Also correct.

7 THE COURT: Is that the only witness the defendant
8 intends to call at this point?

9 MR. RUMELD: Also correct.

10 THE COURT: All right. Terrific.

11 How long do you expect Mr. Sher's direct testimony to
12 last?

13 MR. RUMELD: It is always hard to tell. I won't be
14 surprised if it takes all or most of Thursday.

15 THE COURT: All right.

16 So we've got Thursday and we've got Monday. In any
17 event, Mr. Gottesdiener only has about how much time left?

18 THE LAW CLERK: About two hours.

19 THE COURT: About two hours.

20 We have to leave him two hours.

21 MR. GOTTESDIENER: Your Honor, I guess I didn't make
22 it prominently enough, but we filed a letter today.

23 THE COURT: Yes, I have seen that the letter has come
24 in. I started reviewing it at lunch. I have not concluded my
25 review of it because there are a bunch of different subparts

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Derham - cross

1 that I want to think about. I know you have made an
2 application to preclude much of Sher's testimony.

3 The application is very likely to be denied because
4 most of it goes to the weight, which at this point I can take
5 into consideration. You've got two hours in any event, and
6 that was before making the application.

7 I mean, it's not going to change anything that's going
8 to happen at this point. So the defendant can do their direct
9 examination as they see fit and you will take your best shots.
10 There is a point about the withdrawal of one of the reports.

11 I don't know anything about the withdrawal of the
12 reports yet. I had assumed that the reports that were handed
13 to me as part of the joint pretrial order are the reports.

14 So those are the reports that I have looked at and
15 been thinking about. I have now studied them quite closely.
16 So I am curious to know what is happening with that.

17 But, Mr. Gottesdiener, I will give you a better view
18 of it tomorrow because it seems like a lot of it was frankly
19 similar potentially to what had been done with Mr. Deutsch, at
20 least it's difficult for me to distinguish.

21 You folks are closer to it, so it's easier for you to
22 distinguish. For me it seems to go to weight, and things I can
23 eliminate I can eliminate. I am not going to let any witness
24 become the fact-finder or substitute for factual testimony that
25 ought to come from fact witnesses. But if they use a series of

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Derham - cross

1 documents to inform their opinions at this point, I am just
2 going to let them march on through to get to the bottom line.

3 MR. GOTTESDIENER: There are also 34 slides that we
4 detailed.

5 THE COURT: The slides, though, you had a whole bunch
6 of slides, too. I am very --

7 MR. GOTTESDIENER: But the nature of our objections,
8 your Honor, are completely different than theirs.

9 THE COURT: I understand.
10 The objections, you should take a look at your slides
11 and take a look at the objections that were originally lodged.

12 MR. GOTTESDIENER: When they raised something --

13 THE COURT: Hold on.
14 Let me just go through a couple of little things.
15 One, don't chew gum in my courtroom anymore. OK?
16 Two, don't argue with me.

17 And, three, can you stop the facial expressions. It
18 is driving me out of my mind. You do it with witnesses; you do
19 it with me.

20 I actually have, I think, the patience of, more
21 patience the most judges I know.

22 Don't argue with me. I told you what I will do
23 tomorrow is make a ruling. If you disagree, you have lodged
24 your objection. It is there for appeal.

25 All right. Mr. Rumeld, with Sher, what are you

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Derham - cross

1 withdrawing, if anything? I have only heard about this from
2 Mr. Gottesdiener's letter.

3 Are you putting in a response to the letter?

4 MR. RUMELD: So, first of all, with apologies, your
5 Honor, I think you can see there is a division of labor. Here
6 and Mr. Rachal is back at the office.

7 I do understand there will be a response to
8 Mr. Gottesdiener's letter that we can send in this evening.
9 The report that's being withdrawn is the June 27, 2012,
10 rebuttal report. We are simply withdrawing it as a trial
11 exhibit.

12 THE COURT: As a trial exhibit?

13 MR. RUMELD: Correct.

14 THE COURT: All right.

15 Then as a trial exhibit it is withdrawn. But the fact
16 of it having formed the basis for opinions still leaves it open
17 for cross-examination and doesn't change or alter the
18 statements that Mr. Deutsch made in response to it because all
19 of that was done pretrial and in preparation for trial. So
20 that all remains. You are just not putting it forward
21 affirmatively.

22 MR. RUMELD: I think that's right, your Honor.

23 THE COURT: So it doesn't change Mr. Deutsch's
24 opinions and what he said from his perspective at trial at all.

25 The other issues. For Kanowicz, I have watched quite

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Derham - cross

1 a bit of Kanowicz. There's over four hours of Kanowicz
2 videotape. It would be helpful for me if people could focus
3 me, now that I have watched her discuss the Ducks and the
4 Outlaws and her view of this person and that person, I think I
5 have a sense of her as a witness.

6 I would like to focus on those parts that you believe
7 are particularly important for her credibility. I have read
8 her deposition designations before. I am really watching the
9 videotape to get a sense of what people think is important to
10 see on camera.

11 I haven't gotten to it yet. I am a ways in. I know
12 there's stuff there. I mean, I could predict which I think are
13 the big moments people want me to watch, but I want to give you
14 folks an opportunity. I can't watch the whole four hours. All
15 right.

16 If you want to generally, you can point me to pages in
17 the transcript, I can actually find that. You don't have to
18 give me hours or minutes, because it's easy enough for me just
19 to slide my cursor across the screen, but just something to
20 guide me.

21 Exhibits. I need to understand before we end on
22 Monday or as we end on Monday, what's coming off your list.
23 And this is like I should say lists, because it's your
24 respective lists. The plaintiffs have actually gone through a
25 fair number of their exhibits, but not all.

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1 The defense it's just with the back and forth and the
2 numbers, it's unclear to me. I don't know if you folks have a
3 cross-reference number. I know that Mr. Huang does.

4 It's Huang, right?

5 MR. HUANG: Yes.

6 THE COURT: So somehow if people could give me a
7 revised set of lists so that I could make sure we get entered
8 into evidence that which people are expecting we are going to
9 enter into evidence, that would be very helpful.

10 We will do that then formally by, I'll then state it's
11 received into evidence subject to the objections which have
12 previously been lodged, which I told you I would resolve when I
13 decide what I am relying on. I will then just literally attach
14 the revised exhibit lists.

15 OK. I think that's what I had on my list.

16 All right.

17 Mr. Rumeld, you are going to talk to Mr. Rachal about
18 the Sher response?

19 MR. RUMELD: Yes. We already have an e-mail that
20 indicates he's planning to send a response in.

21 THE COURT: You should ask him if he can meet and
22 confer with Mr. Gottesdiener about the demonstratives, so that
23 at least I don't hear from the first time if only he had talked
24 to me about this we could have changed the following thing.

25 All right?

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1 MR. RUMELD: All right.

2 THE COURT: I am not saying you are going to reach a
3 resolution, but I think the process does need to occur.

4 Thanks. I will see you folks in the morning at 9.

5 MR. GOTTESDIENER: Your Honor, I'm sorry.

6 THE COURT: Yes.

7 MR. GOTTESDIENER: If we are only two hours, this
8 raises a question. If the Court is going to allow Mr. Sher to
9 give lengthy testimony, I don't know that I would need all that
10 time, but I would think if the Court is going to receive even
11 half of what he is offering, that raises a question about
12 Monday and about closing arguments.

13 THE COURT: For Monday, we would come back. If people
14 are still going and we have time left on the clock, we will be
15 back on Monday, and people should plan for that.

16 In terms of closings, let's see where we are. I at
17 this point in time am not feeling like I really need closings
18 because I got the proposed findings of fact, the proposed
19 conclusions of law, I have heard the witnesses, I have been
20 following the documents, but I don't want to preclude people
21 who believe that they have heard it come in and they are very
22 much wanting to give their overview of how it all fits
23 together.

24 In that case, what I will do is we can do that. So
25 it's not unfair we can do it outside the witness time, but give

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Derham - cross

1 it a limited amount time. Do you know what I mean?

2 I'm not going let Mr. Rumeld give a closing and not
3 Mr. Gottesdiener. What I do is preclude you both.

4 So, to make it fair, if either you really feels
5 strongly that you would like something, I would like to keep it
6 limited and I'll keep you both on a clock, but that's how we
7 will do it.

8 That gives you two hours for Mr. Sher.

9 MR. GOTTESDIENER: OK.

10 THE COURT: But only two hours for Mr. Sher. So if
11 he's on for a day and a day plus two hours, your cross is still
12 just two hours.

13 MR. GOTTESDIENER: I understand.

14 Could I also just please, your Honor, apologize to the
15 Court about the gum. I take allergy medication, and every day
16 when I go to the cafeteria, I forget they don't sell mints. So
17 I need to keep something in my mouth.

18 THE COURT: I will give you a little pointer, which is
19 downstairs, the news guy downstairs, they actually sell not
20 only mints but they also sell Hostess cupcakes, not made by
21 Hostess, made by a knockoff of Hostess. I have found them also
22 to hit the spot.

23 MR. GOTTESDIENER: I thought that was imperceptible,
24 but as your Honor said at the beginning of the trial, you see
25 everything.

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1 THE COURT: This is the problem. I understand that
2 I'm much more blunt about that than a lot of people, but I also
3 think that it is important that you guys make your record and
4 you understand if there are other things that are getting in
5 the way of everything. And so here we are. It is all good.

6 MR. GOTTESDIENER: Thank you, your Honor.

7 THE COURT: The case is going to be decided absolutely
8 on the merits, not based upon whether people are drinking
9 coffee, spilling coffee, chewing gum, or otherwise.

10 MR. GOTTESDIENER: Making facial expressions.

11 THE COURT: Making facial expressions. It is on the
12 merits.

13 MR. RUMELD: I can just ask one more question, and we
14 can take this up tomorrow. It seems to me not unlikely that
15 about lunchtime Monday we will be done with Mr. Sher.

16 THE COURT: OK.

17 MR. RUMELD: If there are going to be closing
18 statements, and I will volunteer in advance that given a choice
19 I would like to make a closing statement, would we proceed
20 straight to that Monday afternoon or schedule another time?

21 THE COURT: I will look at my calendar and I will know
22 better -- you need to know Friday. I think we can schedule
23 another time. I told you have I have a bench trial right
24 behind you on Tuesday, but it is very short. So it's possible
25 that I could, depending on your schedules, set something up

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1 before the 31st.

2 But that is what we would be looking at. For the
3 month of August I am doing only criminal things or I am away
4 for a week.

5 MR. GOTTESDIENER: I, too, would like a closing.

6 THE COURT: What I would think is, why don't you folks
7 talk about how much time you would like, whether you would
8 prefer to do it right away, or if you don't, if there is a day
9 when you are both free and I'll try to see if I can be free.

10 Or is that too much to ask for, that level of
11 cooperation?

12 MR. GOTTESDIENER: I think we have been cooperating.

13 THE COURT: OK.

14 MR. GOTTESDIENER: We just object to Mr. Sher.

15 THE COURT: All right. Meet and confer over that
16 topic, and we will talk about it tomorrow.

17 All right. Thanks. We are adjourned.

18 (Adjourned to Thursday, July 23, 2015 at 9 o'clock
19 a.m.)

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